# Top Builders Capital Bhd & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-24NCC-608–12 OF 2020
ONG CHEE KWAN JC
5 JANUARY 2022

*Companies and Corporations — Scheme of arrangement — Application to court — Application to court for sanction for schemes of arrangement — Application for sanction for schemes of arrangement opposed by scheme creditors — Whether statutory requirements set out in s 366 of the Companies Act 2016 had been complied with — Whether creditors had been fairly represented in court convened meeting — Whether majority of creditors voting in favour of scheme had been acting bona fide — Whether schemes of arrangement were one in which any commercial and reasonable man would approve of — Companies Act 2016 ss 366 & 369*

The first applicant was a listed company on the main board of Bursa Malaysia and involved in the civil and building construction industry. The second applicant was the subsidiary of the first applicant and the third applicant was the subsidiary of the second applicant. The applicants suffered financial distress which was worsened due to the Covid-19 pandemic and the Movement Control Order. The first applicant had slipped into PN17 criteria but the formal entering into PN17 was stalled by the relief measures given by Bursa Malaysia. Consequently, the applicants embarked on schemes of arrangements ie TBSB Scheme for the first applicant, IJSB Scheme for the second applicant and IESB Scheme for the third applicant. The total scheme debts of the first, second and third applicants were RM59m, RM422m and RM78m respectively whereas the percentage of scheme creditors that had approved the schemes during the scheme meetings were 75.09%, 80.60% and 100% respectively for each of the first, second and third applicants. The applicants then sought sanction for the schemes of arrangement ('the application') pursuant to s 366 of the Companies Act 2016 ('the CA 2016'). Three out of the four respondents and three interveners ('the six opposing scheme creditors') applied to oppose the sanction based on the following grounds: (a) objections towards the acceptance of the late submissions of the proof of debts ('POD'), and extension of the POD deadline; (b) classification of the creditors was incorrect, where intercompany and/or related creditors should be separately classed or have their votes discounted down to zero — in relation to this ground, it was contended that with the agreement to waive their entitlements under the IJSB scheme, the related company creditors were not interested in the recovery of their adjudicated debts but more on ensuring the continuity of

A the first applicant's group; (c) the applicants' schemes were originally inter-related/inter-conditional, and the applicants' had taken a 'significant change in position' from the original draft of Explanatory Statement ('the ES'); (d) insufficient disclosure or details provided in relation to the white knight investor's fund-raising exercise and quantum of funding to be provided by the B white knight; (e) the first applicant had triggered PN17, or the first applicant's purported PN17 status; (f) the creditors had a right to inspect other creditors' POD forms; (g) the director's notice on personal interest was misleading; (h) lack of disclosure or explanation as to which creditors were excluded from the scheme; (i) a creditor with a claim against a company pursuant to a C corporate guarantee should be classified separately from other unsecured scheme creditors; (j) no audio or visual platform for conducting the Q&A session during the scheme meetings and technical issues faced by one of the creditor ie the third respondent who was prevented from attending the scheme meeting due to failure to login into the virtual meeting had allowed the D applicants to 'bulldoze' through the schemes; (k) the applicants were hopelessly insolvent and it was against public policy to sanction the schemes; and (l) the Damai 88 project which was completed by the third respondent had adversely impacted the performance of the applicants' whole group but what remained ambiguous was the number of units of service apartments that were in fact E received by the applicants' group in debt settlement.

**Held**, allowing the application:

(1) The key guiding principles applicable to sanction by the court of a F scheme of arrangement were as followed: (a) the statutory requirements set out in s 366 of the CA 2016 must have been complied with ('the first element'); (b) the creditors must have been fairly represented in the court convened meeting and the majority of the creditors voting in favour of the scheme must have been acting bona fide ('the second element'); and G (c) the proposed scheme of arrangement was such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve ('the third element') (see para 71).

(2) All unsecured scheme creditors were classified in one single class for the purposes of voting and distribution under each scheme. Whilst it was H true that the court's determination at the leave stage was not final, nevertheless, the court ought to be slow to depart from its earlier determination unless there were any material changes in circumstances or fresh consideration placed before the court. In the present case, the appropriate comparator was the liquidation scenario. It could not be I denied that both the related company creditors and the unsecured scheme creditors shared similar legal rights against the second applicant in relation to their debts. Under the IJSB scheme, both the related company creditors and the unsecured creditors would be settled in a similar fashion, namely, 10% of the adjudicated debts to be paid in cash

and 20% to be converted into the first applicant's ordinary share capital. The balance 70% would be waived or extinguished. The rights accorded to the related company creditors and the unsecured creditors in the event of liquidation were also similar in that both would only be paid pari passu from the surplus funds of the second applicant, if any (see paras 88–91).

(3) The classification of the creditors was based on similarities or dissimilarities of legal rights and not commercial interests. The first respondent had not been able to demonstrate that the legal rights for both the related company creditors and the unsecured creditors in respect of their respective adjudicated debts were dissimilar in nature. The fact that the related company creditors had voluntarily agreed to waive their entitlements did not mean that their legal rights under the scheme were not similar to the unsecured scheme creditors' legal rights. Further, the fourth respondent did not hold any charge, security or any other proprietary interest that would give rise to a proprietary claim against the first applicant nor the second applicant to justify placing them in any other class other than unsecured creditors. The corporate guarantee did not provide the fourth respondent any charge or security over the assets of the first applicant, hence the fourth respondent was not a secured creditor. Therefore, the classification of creditors under the IJSB scheme was correct (see paras 94–96, 104 & 109).

(4) Pursuant to s 369 of the CA 2016, the applicants had issued the ES to their respective scheme creditors to explain the effect of the respective schemes and to state any material interests of directors, and the effect of the respective schemes so far as it was different from the effect on the similar interests of other persons. The ES were drawn up with the assistance of the independent financial advisors, Ernst & Young ('EY'). The earlier drafts of the ES during the convening stage were heavily challenged and criticised by the first respondent in earlier affidavits and submissions. The applicants and EY then made modifications and improvements to the ES for it to be finally issued. Further, the fourth respondent had not demonstrated that any of the creditors who had voted on the schemes was under 'any serious misapprehension of the risks and rewards'. Based on the above, the applicants had disclosed sufficient information that was reasonably necessary to enable the unsecured scheme creditors to make a reasonable judgment on whether the respective schemes were in their commercial interests and for them to vote on the schemes. Therefore, there had been proper disclosure with nothing misleading or deceptive in any material sense (see paras 125–127 & 155–156).

(5) In relation to the first respondent's allegation that the scheme chairman, EY and the applicants' legal counsel not answering all of the questions raised by the unsecured scheme creditors, the court noted from the

minutes of the IJSB scheme meeting that most of the list of 13 questions submitted by the first respondent were raised and answered at the scheme meeting itself and the applicants had followed up with a written reply. The court was satisfied with the explanation by the applicants that due to the sheer number of questions, the applicants had to be selective in answering the questions within the limited timeframe to be fair to each scheme creditor. In respect of the failure of the third respondent to login into the virtual meeting, the applicants had highlighted that the third respondent was not intentionally prevented from logging on and vote on the IJSB scheme and the third respondent was the only scheme creditor out of the 99 scheme creditors who had experienced such technical issue. Further, in light of the third respondent's value of claim (0.05% of the scheme debts), its vote against the IJSB scheme would not have affected the value of debts voting in favour in a material manner (see paras 169–171 & 174–175).

(6) It had not been shown to the court that the lack of fluency in the virtual scheme meeting and or absence of the 'breakout rooms' had led to the unsecured creditors not being able to appreciate the IJSB scheme. Further, through answers that were read out by the scheme chairman to the questions posed, all the participants were made aware of the concerns expressed by their fellow creditors regarding the IJSB scheme and had presumably taken those concerns on board in their own evaluation of the IJSB scheme. Hence, the court was satisfied that the creditors were already fully aware of the details and effect of the schemes and the consequences of the schemes if approved. The disadvantages raised regarding the conduct of the meeting in this case were not such that would compel the court to withhold the sanction of the schemes. Accordingly, the court held that the manner in which the virtual scheme meeting was held did meet the requirement of a 'meeting' and the disadvantages were not such that there were no effective deliberation and discussion of the issues amongst the participants (see paras 181–182 & 184).

(7) The court indeed had the discretion to extend the admission of the PODs during the sanction hearing. The scheme chairman had acted in good faith by trying to ensure that the relevant scheme creditors with legitimate claims against the applicants would not be substantially prejudiced by submitting their PODs late. The court found no prejudice to any of the unsecured creditors for allowing the extensions (see para 191).

(8) It was not a precondition for the second applicant to satisfy each scheme creditor of the extent of its debts prior to the scheme meeting, especially where there was already a procedure for the adjudication of claims in place. Further, neither the first respondent or the fourth respondent had

produced any prima facie evidence of impropriety in the admission or rejection of the PODs by the scheme chairman in order to be entitled to the PODs requested. They were at liberty to apply to the court for a disclosure order, but they did not do so. In any event, the applicants had produced for the court the POD forms and the supporting documents as filed by the applicants (see paras 211–213).

(9) The opposing creditors had not demonstrated to the court that the scheme creditors would be better off without the IJSB scheme and/or that there was a good possibility that the applicants were in a position to significantly improve on the current scheme. There was little evidence that the applicants and the white knight were otherwise than genuine and bona fide in their commitments to see through the schemes. The fact that the intercompany creditors and the related company creditors may have a separate and or 'special interests' to see the continuity of the first applicant's group as a going concern, this alone without more, could not be a reason to disregard their votes. There was no evidence to suggest that the debts due to the related company creditors were not genuine debts. More specifically, there was no evidence that the 'special interests' of the intercompany creditors and/or related company creditors were adverse to the interests of the other scheme creditors. Therefore, the court rejected the opposing scheme creditors' contention to disregard the votes of the intercompany creditors and the related company creditors (see paras 242–245 & 251).

(10) The court found that the third element had been satisfied for the following reasons: (a) the proposed debt resolution under the schemes of arrangement offered the unsecured scheme creditors a better recovery of 30% of their debts than they would receive if the applicants were wound up; (b) in these tough economic times, the requisite majority of the unsecured scheme creditors present and voting had made the commercial decision to take the applicants' offer; (c) the schemes of arrangement involved an investor in the form of the white knight who had already shown its commitment towards the rescue and restructuring of the applicants' business; and (d) the approval of the schemes of arrangement allowed the applicants to continue as a going concern. The court therefore agreed that the schemes of arrangement were one in which any commercial and reasonable man would approve of. The unsecured scheme creditors of the applicants had in fact made that commercial decision (see paras 253 & 259–260).

(11) During oral submissions, learned counsel for the applicants was unable to satisfactorily explain the inconsistencies regarding the various statements made pertaining to the Damai 88 units notwithstanding the assurances given to the court that there was no concealment of any such units by any of the applicants. In relation to this, the court had imposed a condition

for the sanction that EY, as the restructuring advisor for the applicants' schemes of arrangement was directed to conduct an audit on all, if any, of the Damai 88 units that were in fact transferred and or assigned from the developer to the applicants and or their nominees and that any such units found to be credited as part of the assets of the applicants for additional distribution to the creditors (see paras 273–275).

**[Bahasa Malaysia summary**

Pemohon pertama adalah syarikat yang tersenarai di pasaran utama Bursa Malaysia dan terlibat dalam industri pembinaan awam dan bangunan. Pemohon kedua adalah anak syarikat kepada pemohon pertama dan pemohon ketiga adalah anak syarikat kepada pemohon kedua. Pemohon mengalami masalah kewangan yang teruk yang diburukkan lagi dengan kehadiran pandemik Covid-19 dan Perintah Kawalan Pergerakan. Pemohon pertama telah termasuk ke dalam kriteria PN17 tetapi kemasukan rasmi ke PN17 ditangguhkan disebabkan oleh langkah pelepasan yang diberikan oleh Bursa Malaysia. Oleh itu, pemohon-pemohon telah memulakan skim perkiraan iaitu Skim TBSB untuk pemohon pertama, Skim IJSB untuk pemohon kedua dan Skim IESB untuk pemohon ketiga. Jumlah hutang skim pemohon pertama, kedua dan ketiga masing-masing ialah RM59 juta, RM422 juta dan RM78 juta manakala peratusan pemiutang-pemiutang skim yang telah meluluskan skim semasa mesyuarat skim ialah 75.09%, 80.60% dan 100% masing-masing bagi setiap pemohon pertama, kedua dan ketiga. Pemohon-pemohon kemudiannya memohon kebenaran untuk skim perkiraan ('permohonan') menurut s 366 Akta Syarikat 2016 ('AS 2016'). Tiga daripada empat responden dan tiga pencelah ('enam pemiutang skim yang menentang') memohon untuk mencabar kebenaran berdasarkan alasan-alasan berikut: (a) bantahan terhadap penerimaan lewat penyerahan bukti hutang ('PBH'), dan lanjutan tarikh akhir PBH; (b) klasifikasi pemiutang adalah tidak betul, di mana pemiutang dalaman syarikat dan/atau pemiutang berkaitan harus dikelaskan secara berasingan atau undi mereka dikurangkan kepada sifar — berhubung dengan alasan ini, telah dihujahkan bahawa dengan persetujuan untuk mengetepikan kelayakan mereka di bawah skim IJSB ini, pemiutang syarikat berkaitan tidak berminat untuk mendapatkan semula hutang mereka yang telah diputuskan tetapi lebih kepada ingin memastikan kesinambungan kumpulan pemohon pertama; (c) skim pemohon-pemohon pada asalnya saling berkaitan/bergantung syarat, dan pemohon-pemohon telah mengambil 'perubahan kedudukan yang ketara' daripada draf asal Penyata Penerangan ('ES'); (d) pendedahan atau butiran yang tidak mencukupi yang diberikan berhubung dengan aktiviti penjanaan dana oleh pelabur 'white knight' dan kuantum pembiayaan yang akan disediakan oleh 'white knight'; (e) pemohon pertama telah mencetuskan PN17, atau dakwaan status PN17 pemohon pertama; (f) pemiutang-pemiutang mempunyai hak untuk memeriksa borang PBH pemiutang-pemiutang lain; (g) notis pengarah mengenai kepentingan peribadi adalah mengelirukan; (h) kekurangan pendedahan atau penjelasan

tentang pemiutang-pemiutang yang dikecualikan daripada skim tersebut; (i) pemiutang yang mempunyai tuntutan terhadap syarikat berdasarkan jaminan korporat hendaklah diklasifikasikan secara berasingan daripada pemiutang-pemiutang skim yang tidak mempunyai cagaran yang lain; (j) ketiadaan platform audio atau visual untuk menjalankan sesi soal jawab semasa mesyuarat skim dan isu teknikal yang dihadapi oleh salah seorang pemiutang iaitu responden ketiga yang dihalang daripada menghadiri mesyuarat skim kerana kegagalan untuk log masuk ke mesyuarat maya telah membenarkan pemohon-pemohon untuk memaksa pakai skim berkenaan; (k) pemohon-pemohon telah muflis dan ia adalah bertentangan dengan dasar awam untuk membenarkan skim tersebut; dan (l) projek Damai 88 yang telah disiapkan oleh responden ketiga telah memberi kesan buruk kepada prestasi keseluruhan kumpulan pemohon-pemohon tetapi apa yang masih kabur ialah bilangan unit pangsapuri perkhidmatan yang sebenarnya diterima oleh kumpulan pemohon-pemohon dalam penyelesaian hutang mereka.

**Diputuskan**, membenarkan permohonan:

(1) Prinsip panduan utama yang terpakai kepada kebenaran oleh mahkamah bagi sesuatu skim perkiraan adalah seperti berikut: (a) keperluan statutori yang ditetapkan dalam s 366 AS 2016 mestilah dipenuhi ('elemen pertama'); (b) pemiutang-pemiutang mestilah diwakili secara adil dalam mesyuarat yang diperintahkan oleh mahkamah dan majoriti pemiutang yang mengundi untuk menyokong skim tersebut mestilah bertindak secara bona fide ('elemen kedua'); dan (c) skim perkiraan yang dicadangkan tersebut mungkin secara munasabahnya diluluskan oleh seorang individu yang bijak dan jujur, seorang ahli dalam kelas yang berkenaan dan bertindak untuk kepentingannya ('elemen ketiga') (lihat perenggan 71).

(2) Semua pemiutang-pemiutang yang tidak bercagar bagi skim tersebut dikelaskan dalam satu kelas tunggal untuk tujuan pengundian dan pengagihan di bawah setiap skim. Walaupun adalah benar bahawa penentuan mahkamah pada peringkat permohonan kebenaran tidak muktamad, namun, mahkamah sepatutnya tidak terburu-buru untuk mengubah keputusannya yang lalu melainkan terdapat apa-apa perubahan penting dalam keadaan atau pertimbangan baru yang dikemukakan di hadapan mahkamah. Dalam kes ini, pembandingan yang sesuai ialah senario pembubaran syarikat. Tidak dapat dinafikan bahawa kedua-dua pemiutang-pemiutang syarikat berkaitan dan pemiutang-pemiutang skim tidak bercagar berkongsi hak undang-undang yang sama terhadap pemohon kedua berhubung dengan hutang mereka. Di bawah skim IJSB tersebut, kedua-dua pemiutang-pemiutang syarikat berkaitan dan pemiutang-pemiutang tidak bercagar akan diselesaikan dengan cara yang sama, iaitu, 10% daripada hutang yang telah diputuskan perlu dibayar secara tunai dan

20% hutang ditukar kepada modal saham biasa pemohon pertama. Baki 70% akan diketepikan atau dihapuskan. Hak yang diberikan kepada pemiutang-pemiutang syarikat yang berkaitan dan pemiutang-pemiutang tidak bercagar sekiranya berlakunya pembubaran juga adalah serupa kerana kedua-duanya hanya akan dibayar pari passu daripada lebihan dana pemohon kedua, jika ada (lihat perenggan 88–91).

(3) Klasifikasi pemiutang-pemiutang adalah berdasarkan persamaan atau ketidaksamaan hak undang-undang dan bukan kepentingan komersial. Responden pertama tidak dapat menunjukkan bahawa hak undang-undang untuk kedua-dua pemiutang-pemiutang syarikat berkaitan dan pemiutang-pemiutang tidak bercagar berkenaan dengan hutang yang diputuskan adalah berbeza dari segi sifatnya. Hakikat bahawa pemiutang-pemiutang syarikat berkaitan telah secara sukarela bersetuju untuk mengetepikan kelayakan mereka tidak bermakna bahawa hak undang-undang mereka di bawah skim tersebut tidak serupa dengan hak undang-undang pemiutang-pemiutang tidak bercagar bagi skim tersebut. Selanjutnya, responden keempat tidak memegang apa-apa cagaran, jaminan atau apa-apa kepentingan proprietari lain yang akan menimbulkan tuntutan proprietari terhadap pemohon pertama atau pemohon kedua untuk mewajarkan perletakan mereka dalam mana-mana kelas lain selain daripada pemiutang-pemiutang tidak bercagar. Jaminan korporat tidak memberikan responden keempat apa-apa cagaran atau jaminan ke atas aset pemohon pertama, justeru responden keempat bukanlah pemiutang bercagar. Oleh itu, klasifikasi pemiutang di bawah skim IJSB tersebut adalah betul (lihat perenggan 94–96, 104 & 109).

(4) Menurut s 369 AS 2016, pemohon-pemohon telah mengeluarkan ES kepada pemiutang-pemiutang skim masing-masing untuk menjelaskan kesan skim masing-masing dan menyatakan apa-apa kepentingan material pengarah, dan kesan skim masing-masing setakat mana ianya berbeza daripada kesan ke atas kepentingan yang sama bagi orang lain. ES tersebut telah disediakan dengan bantuan penasihat kewangan bebas, Ernst & Young ('EY'). Draf awal ES tersebut semasa peringkat persidangan telah dicabar dan dikritik hebat oleh responden pertama dalam afidavit dan penghujahan awalnya. Pemohon-pemohon dan EY kemudiannya membuat pengubahsuaian dan penambahbaikan kepada ES tersebut untuk akhirnya ianya dikeluarkan. Selanjutnya, responden keempat tidak menunjukkan bahawa mana-mana pemiutang yang telah mengundi skim tersebut berada di bawah 'apa-apa salah faham yang serius tentang risiko dan ganjaran'. Berdasarkan dapatan di atas, pemohon-pemohon telah mendedahkan maklumat yang mencukupi yang semunasabahnya perlu untuk membolehkan pemiutang-pemiutang tidak bercagar bagi skim tersebut membuat

pertimbangan yang munasabah sama ada skim masing-masing adalah untuk kepentingan komersial mereka dan untuk mereka mengundi skim tersebut. Oleh itu, terdapat pendedahan yang betul tanpa apa-apa yang mengelirukan atau memperdaya dari segi material (lihat perenggan 125–127 & 155–156).

(5) Berhubung dengan dakwaan responden pertama bahawa pengerusi skim, EY dan peguam bela pemohon tidak menjawab semua soalan yang dikemukakan oleh pemiutang-pemiutang tidak bercagar bagi skim tersebut, mahkamah mendapati daripada minit mesyuarat skim IJSB tersebut bahawa kebanyakan senarai daripada 13 soalan yang dikemukakan oleh responden pertama telah dibangkitkan dan dijawab pada mesyuarat skim itu sendiri dan pemohon-pemohon telah membuat susulan dengan jawapan bertulis. Mahkamah berpuas hati dengan penjelasan pemohon-pemohon bahawa disebabkan terlampau banyak soalan, pemohon-pemohon perlu menjadi selektif dalam menjawab soalan dalam tempoh masa yang terhad untuk berlaku adil kepada setiap pemiutang skim. Berkenaan dengan kegagalan responden ketiga untuk log masuk ke dalam mesyuarat maya, pemohon-pemohon telah menekankan bahawa responden ketiga tidak sengaja dihalang daripada log masuk dan mengundi skim IJSB tersebut dan responden ketiga adalah satu-satunya pemiutang skim daripada 99 pemiutang skim tersebut yang mengalami isu teknikal tersebut. Selanjutnya, berdasarkan nilai tuntutan responden ketiga (0.05% daripada hutang skim), undinya terhadap skim IJSB tersebut tidak akan menjejaskan secara material nilai undian bagi hutang-hutang yang menyokong skim tersebut (lihat perenggan 169–171 & 174–175)

(6) Tidak ditunjukkan kepada mahkamah bahawa kekurangan kelancaran dalam mesyuarat skim secara maya dan atau ketiadaan 'breakout rooms' telah menyebabkan pemiutang-pemiutang tidak bercagar tidak dapat menghargai skim IJSB tersebut. Selanjutnya, melalui jawapan-jawapan yang dibacakan oleh pengerusi skim kepada soalan-soalan yang dikemukakan, semua peserta dimaklumkan tentang kebimbangan yang dinyatakan oleh rakan pemiutang mereka mengenai skim IJSB tersebut dan mungkin telah mengambil kira kebimbangan tersebut dalam penilaian mereka sendiri terhadap skim IJSB tersebut. Oleh itu, mahkamah berpuas hati bahawa pemiutang-pemiutang sudah mengetahui sepenuhnya butiran dan kesan skim tersebut dan akibat daripada skim tersebut jika diluluskan. Kelemahan yang ditimbulkan mengenai pengendalian mesyuarat dalam kes ini bukanlah sesuatu yang akan memaksa mahkamah untuk tidak memberikan kebenaran bagi skim tersebut. Oleh yang demikian, mahkamah memutuskan bahawa cara mesyuarat skim maya tersebut diadakan memenuhi keperluan 'mesyuarat' dan kelemahannya tidaklah sehingga menyebabkan tiada perincian dan perbincangan berkesan berkenaan isu-isu yang berkaitan

di kalangan peserta-peserta (lihat perenggan 181–182 & 184).

(7) Mahkamah sememangnya mempunyai budi bicara untuk melanjutkan penerimaan PBH semasa perbicaraan kebenaran. Pengerusi skim tersebut telah bertindak dengan suci hati apabila cuba memastikan bahawa pemiutang-pemiutang skim yang berkaitan dengan tuntutan yang sah terhadap pemohon-pemohon tidak diprejudiskan secara substantial disebabkan oleh kelewatan pengemukaan PBH mereka. Mahkamah mendapati bahawa pembenaran pelanjutan tersebut tidak memprejudiskan mana-mana pemiutang-pemiutang yang tidak bercagar (lihat perenggan 191).

(8) Ia bukanlah prasyarat bagi pemohon kedua untuk memuaskan setiap pemiutang skim tentang takat hutangnya sebelum mesyuarat skim, terutamanya di mana telah disediakan prosedur untuk adjudikasi tuntutan. Selanjutnya, responden pertama atau responden keempat tidak mengemukakan apa-apa keterangan prima facie tentang ketidakwajaran dalam penerimaan atau penolakan PBH oleh pengerusi skim untuk melayakkan mereka menerima PBH yang diminta. Mereka bebas untuk memohon kepada mahkamah untuk mendapatkan perintah pendedahan, tetapi mereka tidak berbuat demikian. Dalam apa jua keadaan, pemohon-pemohon telah mengemukakan kepada mahkamah borang PBH dan dokumen sokongan seperti yang difailkan oleh pemohon-pemohon (lihat perenggan 211–213).

(9) Pemiutang-pemiutang yang menentang tidak menunjukkan kepada mahkamah bahawa keadaan pemiutang-pemiutang skim akan lebih baik tanpa skim IJSB tersebut dan/atau terdapat kemungkinan besar bahawa pemohon-pemohon berada dalam kedudukan untuk menambah baik skim semasa dengan ketara. Terdapat kekurangan keterangan bahawa pemohon-pemohon dan 'white knight' tersebut adalah tidak ikhlas dan bona fide dalam komitmen mereka untuk melaksanakan skim tersebut. Hakikat bahawa pemiutang-pemiutang dalaman syarikat dan pemiutang-pemiutang syarikat yang berkaitan mungkin mempunyai kepentingan berbeza dan/atau 'kepentingan khas' untuk melihat kesinambungan kumpulan pemohon pertama untuk terus beroperasi sahaja tidak boleh menjadi alasan untuk mengabaikan undi mereka. Tiada keterangan yang menunjukkan bahawa hutang yang perlu dibayar kepada pemiutang-pemiutang syarikat yang berkaitan tersebut bukan hutang yang sah. Lebih khusus lagi, tiada keterangan bahawa 'kepentingan khas' pemiutang-pemiutang dalaman syarikat dan/atau pemiutang-pemiutang syarikat yang berkaitan adalah bertentangan dengan kepentingan pemiutang-pemiutang skim lain. Oleh itu, mahkamah menolak hujahan pemiutang-pemiutang skim yang menentang untuk mengabaikan undi pemiutang-pemiutang dalaman

syarikat dan pemiutang-pemiutang syarikat yang berkaitan (lihat perenggan 242–245 & 251).

(10) Mahkamah mendapati bahawa elemen ketiga telah dipenuhi atas alasan-alasan berikut: (a) cadangan penyelesaian hutang di bawah skim perkiraan tersebut menawarkan pemiutang-pemiutang skim tidak bercagar pemulihan yang lebih baik sebanyak 30% daripada hutang mereka daripada yang akan mereka terima jika pemohon-pemohon digulung; (b) dalam masa ekonomi yang sukar ini, majoriti pemiutang-pemiutang skim tidak bercagar yang hadir dan mengundi telah membuat keputusan komersial untuk menerima tawaran pemohon-pemohon; (c) skim perkiraan tersebut melibatkan pelabur iaitu 'white knight' yang telah menunjukkan komitmennya terhadap penyelamatan dan penstrukturan semula perniagaan pemohon-pemohon; dan (d) kelulusan skim perkiraan tersebut akan membolehkan pemohon-pemohon untuk meneruskan perniagaannya. Oleh itu, mahkamah bersetuju bahawa skim perkiraan tersebut adalah suatu skim yang akan dipersetujui oleh mana-mana individu dalam komersial dan individu yang munasabah. Pemiutang-pemiutang tidak bercagar pemohon-pemohon bagi skim tersebut sebenarnya telah membuat keputusan komersial tersebut (lihat perenggan 253 & 259–260).

(11) Semasa penghujahan lisan, peguam terpelajar bagi pemohon-pemohon tidak dapat menjelaskan dengan memuaskan ketidakselarasan mengenai pelbagai kenyataan yang dibuat berkaitan dengan unit-unit di dalam Damai 88 walaupun terdapat jaminan yang diberikan kepada mahkamah bahawa tidak ada penyembunyian mana-mana unit sedemikian oleh mana-mana pemohon. Sehubungan dengan ini, mahkamah telah mengenakan syarat bagi pemberian kebenaran di mana EY, sebagai penasihat penyusunan semula bagi skim perkiraan pemohon-pemohon diarahkan untuk menjalankan audit ke atas semua, jika ada, daripada unit-unit di dalam Damai 88 yang sebenarnya dipindahkan dan atau diserahkan oleh pemaju kepada pemohon-pemohon dan atau penama-penama mereka dan bahawa mana-mana unit yang ditemui dikreditkan sebagai sebahagian daripada aset pemohon-pemohon untuk pengagihan tambahan kepada pemiutang-pemiutang (lihat perenggan 273–275).]

**Cases referred to**

*Airasia X Bhd v BOC Aviation Ltd & Ors* [2021] 10 MLJ 942, HC (refd)
*Apcoa Parking Holdings GmbH and others, Re* [2015] 2 BCLC 659, Ch D (refd)
*Bluebrook Ltd and other companies, Re* [2009] EWHC 2114 (Ch), Ch D (refd)
*British Aviation Insurance Co Ltd, Re* [2006] 1 BCLC 665, Ch D (refd)
*Crusader Ltd, Re* [1996] 1 Qd R 117, SC (refd)
*Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 4 SLR 35, CA (refd)

A *Dorman, Long & Company Ltd, In re* [1934] Ch 635, Ch D (refd)
*Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & Ors and other appeals* [2014] 6 MLJ 56, FC (refd)
*Fraser v NMRA Holdings Ltd* (1995) 55 FCR 452, FC (refd)
*Halley's Departmental Store Pte Ltd, Re* [1996] 2 SLR 70, HC (refd)
B *Hawk Insurance Co Ltd, Re* [2001] 2 BCLC 480, Ch D (refd)
*Jin Lin Wood Industries Sdn Bhd and others v Mulpha International Bhd* [2005] MLJU 326; [2005] 7 CLJ 208, HC (refd)
*Khondker Yarad Ahmed, Re; ex p MIDF Amanah Ventures Sdn Bhd* [2016] 3 CLJ 637
C *Landmark Corporation Ltd, Re* [1968] 1 NSWR 759 (refd)
*Lehman Brothers International (Europe) (in administration), Re* [2018] EWHC 1980 (Ch), Ch D (refd)
*Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253, FC (refd)
D *NRMA Insurance Ltd (No 1), Re* [2000] NSWSC 82, SC (refd)
*Malaysian Trustees Bhd v Transmile Group Bhd & Ors* [2012] 3 MLJ 679, CA (refd)
*Pathfinder Strategic Credit LP and Another v Empire Capital Resources Pte Ltd and Another Appeal* [2019] 2 SLR 77; [2019] SGCA 29, CA (refd)
E *Petition of Premier Oil PLC and Premier Oil UK Ltd for sanction of schemes of arrangement* [2020] CSOH 39 (refd)
*Phosphate Co-operative Co of Aust Ltd v Shears & Anor (No 3)* [1989] VR 665, SC (refd)
*SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another* F *appeal* [2017] 2 SLR 898; [2017] SGCA 51, CA (refd)
*Sateras Resources (Malaysia) Bhd, Re* [2005] 6 CLJ 194, HC (refd)
*Sea Assets Limited v Perusahaan Perseroan (Persero) Pt Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696, CA (refd)
*Sentoria Bina Sdn Bhd v Impak Kejora Sdn Bhd & Ors* [2021] 12 MLJ
G 690; [2021] 9 CLJ 814, HC (refd)
*Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, CA (refd)
*Sunbird Business Services Ltd, Re* [2020] EWHC 3459 (Ch), Ch D (refd)
*TH Heavy Engineering Bhd & Ors* [2018] MLJU 466, HC (refd)
*Telewest Communications plc (No 2), Re; Re Telewest Finance (Jersey) Ltd (No*
H *2)* [2005] 1 BCLC 772, Ch D (refd)
*The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGCA 18, CA (refd)
*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213, CA (not
I folld)
*Transmile Group Bhd & Anor v Malaysian Trustees Bhd & Ors* [2012] MLJU 130, HC (folld)
*Top Builders Capital Bhd & Ors, Re* [2021] 10 MLJ 327, HC (refd)
*UDL Holdings Ltd & Ors, Re* [2002] 1 HKC 172 (refd)

*Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR 629; [2003] SGCA 23, CA (folld)
*Wesfarmers Ltd; Ex parte Wesfarmers Ltd, Re* [2018] WASC 308, SC (refd)

**Legislation referred to**

Corporations Act 2001 [AU] s 412
Companies Act 1965 (repealed by Companies Act 2016) s 176
Companies Act 2016 ss 116, 362(2)(d), 366, 366(3), (4), (5), (6), (7), 369
Contracts Act 1950 s 44(1)
Companies Act 2006 [UK] s 897

*Lee Shih (Pang Huey Lynn with him) (Lim Chee Wee Partnership) for the applicant.*
*Wong Kah Hui (Low Jia Juan with him) (KH Wong & Co) for the first respondent.*
*Loi Lai Mee (Loi Tan & Assoc) for the third respondent.*
*Ramesh K Supramaniam (Kanarasan Ghandinesen with hiim) (Ramesh K Supramaniam) for the fourth to seventh respondent.*

**Ong Chee Kwan JC:**

INTRODUCTION

**[1]** The applicants seek sanction for the schemes of arrangement as set out in Annexure A1, A2 and A3 of the applicants' notice of application ('encl 83' or 'sanction application').

**[2]** The first applicant is a listed company on the Main Board of Bursa Malaysia. It is involved in the civil and building construction industry. The second applicant is a wholly-owned subsidiary of the first applicant. In turn, the third applicant is a wholly-owned subsidiary of the second applicant.

**[3]** The first applicant's group of companies ran into severe financial distress, and the distress was further exacerbated during Covid-19 pandemic and the Movement Control Order ('MCO') restrictions on the construction industry.

**[4]** On 30 June 2020, the first applicant slipped into PN17 criteria. However, the Bursa Malaysia relief measures (arising from Covid-19 pandemic and MCO) provided time for the first applicant to stall a formal entering into PN17. The limited time period under the PN17 relief of only 18 months (ie up to 29 December 2021) proved to be significant.

**[5]** With the financial distress on the first applicant in June 2020, the first applicant's group of companies required urgent debt restructuring and rescue.

With the assistance of its appointed financial advisors, Ernst & Young ('EY'), the applicants embarked on a scheme of arrangement.

**[6]** On 31 December 2020, the applicants obtained the orders for leave to hold meetings with their respective scheme creditors ('scheme meetings') as well as a restraining order.

**[7]** In the negotiation phase between the applicants and its scheme creditors, the mechanics of the schemes of arrangement continued to be finetuned. The first applicant worked with a White Knight and the first applicant's capital market advisors to also try to effect an overall successful restructuring.

**[8]** The terms of the schemes of arrangement envisage the scheme creditors obtaining a 30% return on their adjudicated debts: 10% in the form of cash payment and 20% in terms of the issuance of ordinary shares of the first applicant. This is compared with a liquidation of the applicants and a liquidation recovery ranging from nil to 9% recovery (depending on which applicant company).

**[9]** With the adjudication of all the proof of debt forms that were submitted in the scheme, the total scheme debts of each of the applicants are approximately:

(a) first applicant: RM59m;

(b) second applicant: RM422m; and

(c) third applicant: RM78m.

**[10]** On 26 August 2021, the applicants held the three scheme meetings on a virtual meeting platform. The summary of the voting that approved the schemes of arrangement is:

(a) first applicant: 75.09%;

(b) second applicant: 80.60%; and

(c) third applicant: 100%.

**[11]** There are opposing parties in these proceedings seeking sanction of the schemes: three out of the four respondents and three interveners applied to oppose the sanction. They are referred to as the opposing scheme creditors. In particular, the opposing scheme creditors are objecting to the second applicant's scheme of arrangement ('the IJSB scheme'). The value of the opposing scheme creditors' scheme debts ranges from 0.18% to 6.16% of the scheme debts of the second applicant.

**[12]** The first applicant's financial advisors have informed the first applicant of the dire need to obtain a decision on sanction by the end of November 2021. This would allow the first applicant's group of companies to reflect the debt restructuring and to carry out a special audit and announce the results before 29 December 2021. After this deadline, the PN17 relief measures will expire and the first applicant would formally trigger PN17 resulting in dire consequences for the first applicant, potentially leading to the loss of the white knight support.

**[13]** Therefore, the applicants sought for sanction as well as an expedited decision in order to effect a corporate rescue of the applicants and to ensure better returns to the applicants' creditors compared with that of the applicants going into liquidation.

BACKGROUND FACTS

*The applicants: TBCB, IJSB and IESB*

**[14]** The first applicant, Top Builders Capital Bhd ('TBCB'), is listed on the Main Market of Bursa Malaysia.

**[15]** The first applicant, and the first applicant's group of companies ('TBCB Group'), are engaged in civil and building construction. The first applicant is involved in the engineering and construction of piling and foundation, bridges and buildings.

**[16]** The second applicant, Ikhmas Jaya Sdn Bhd ('IJSB'), is a Malaysian based geotechnical contractor and has established themselves as a bore piling specialist. The second applicant is a wholly-owned subsidiary of the first applicant.

**[17]** The third applicant, Ikhmas Equipment Sdn Bhd ('IESB'), is principally involved in providing services to the TBCB Group in the form of rental provision for engineering and construction equipment. The third applicant is a wholly-owned subsidiary of the second applicant.

*The respondents and interveners*

**[18]** The first respondent, Seng Long Construction & Engineering Sdn Bhd ('Seng Long'), is a creditor of IJSB. Seng Long is in the business of construction and renovation. IJSB had engaged Seng Long in a project known as the OPUS Residence project which has since been completed ('Opus Project') On 9 February 2021, Seng Long had applied to intervene in the scheme proceedings. Seng Long is opposing this sanction application.

A **[19]** The second respondent, Ilham Metro Construction Sdn Bhd ('IMC'), is a creditor of TBCB and IJSB. TBCB had subcontracted works on a project to a joint venture vehicle formed between IMC and IJSB. On 20 April 2021, IMC applied for leave to proceed against TBCB and IJSB under the restraining order. Leave was dismissed by this court on 15 June 2021. IMC ultimately B attended and voted in favour of the TBCB and IJSB schemes. IMC is *not* opposing this sanction application.

**[20]** The third respondent, Edwincom Enterprise ('Edwincom'), is a C creditor of IJSB. Edwincom was appointed by IJSB as a subcontractor for the works in a project known as the Damai 88 project. Edwincom had completed the works. Edwincom had submitted their POD and proxy/attendance form for the purposes of the IJSB scheme meeting. However, due to technical difficulties Edwincom was inadvertently prevented from attending the IJSB scheme meeting. Edwincom is opposing this sanction application. D

**[21]** The fourth respondent, Star Effort Sdn Bhd ('SESB'), is a creditor of TBCB and IJSB. SESB was appointed by IJSB to perform, construct and complete the services and works for the Opus Project. TBCB had then issued five corporate guarantees in favour of SESB. TBCB subsequently issued a sixth E corporate guarantee, which superseded the previous five corporate guarantees. SESB is opposing this sanction application.

**[22]** The first proposed intervener, BOFI (M) Sdn Bhd ('BOFI'), is a F creditor of IJSB. BOFI was appointed by IJSB as a subcontractor for the Opus Project. BOFI is one of the unsecured scheme creditors which submitted their POD past the deadlines during the POD exercise. BOFI falls within what is referred to below as the Tranche 2 PODs. BOFI did not attend the IJSB scheme meeting but is opposing this sanction application. G

**[23]** The second proposed intervener, SR Marble Sdn Bhd ('SR Marble'), is a creditor of IJSB. SR Marble was appointed by IJSB as a subcontractor for the Opus Project. SR Marble completely failed to submit their POD for the IJSB scheme meeting. SR Marble is opposing this sanction application. H

**[24]** The third proposed intervener, Persflor Sdn Bhd ('Persflor'), is a creditor of IJSB. Persflor was appointed by IJSB as a subcontractor for the Opus Project. Persflor had submitted their POD and proxy/attendance form and attended the IJSB scheme meeting. Persflor has voted against the IJSB I scheme. Persflor is opposing this sanction application.

**[25]** The various debts of the parties to this proceeding as adjudicated in the proof of debt exercise, and the approximate percentage (%) of their debt out of each applicants' scheme debts, are as follows:

In relation to IJSB: Scheme debts of more than RM422m

| Respondent/proposed interveners | RM | Percentage (%) of the scheme debts |
|---|---|---|
| Seng Long Construction & Engineering Sdn Bhd | 3,791,328.02 | 0.89% |
| Ilham Metro (not objecting to sanction) | 7,155,558.00 | 1.69% |
| Edwincom Enterprise | 231,501.12 | 0.05% |
| Star Effort Sdn Bhd | 26,036,318.36 | 6.16% |
| BOFI (M) Sdn Bhd | 779,116.93 | 0.18% |
| Persflor Sdn Bhd | 968,454.82 | 0.22% |
| SR Marble Sdn Bhd | Alleged RM504,596.27 IJSB's Statement of Affairs reflect RM29,901.69 | |

In relation to TBCB: Scheme Debts of more than RM59m

| Opposing Creditor | RM | Percentage (%) of the scheme debts |
|---|---|---|
| Star Effort Sdn Bhd | 12,000,000 | 20.31% |
| | Star Efforts Claims 26,036,318.36 | |

*The applicants' financial distress and risk of PN17*

**[26]** A chronology of events leading up to the court convened meetings held on 26 August 2021 is now set out below.

**[27]** The first applicant suffered massive losses for financial year 2018 and 2019. The applicants had recorded net losses since financial year ending 31 December 2018 as well as cash flow constraints.

**[28]** On 30 June 2020, the first applicant announced that it triggered paras 2.1(a) and 2.1(e) of Practice Note 17 ('PN17') of the Main Market Listing Requirements ('Listing Requirements') of Bursa Malaysia Securities Bhd ('Bursa Securities') whereby:

(a) parag 2.1(a) — the consolidated shareholders' equity of TBCB and its subsidiaries ('Group') is 25% or less of its share capital and the said consolidated shareholders' equity is less than RM40m; and

A (b) para 2.1(e) — its auditors highlighted material uncertainties which may affect the Group's ability to continue as a going concern in its audited financial statements for the financial year ended 31 December 2019 and the consolidated shareholders' equity of the Group is 50% or less of its share capital.

B

**[29]** However, Bursa Securities had announced on 16 April 2020 that as part of relief measures undertaken as a result of the COVID-19 pandemic, any listed issuer which triggers any of the abovementioned criteria between 17 April 2020 and 30 June 2021 would not be classified as a PN17 listed issuer C ('PN17 Suspended Period') and would not be required to comply with the obligations pursuant to para 8.04 and PN17 of the Listing Requirements for a period of 12 months from the date of triggering ('relief period'). On 17 February 2021, the relief period was extended to 18 months. As such, TBCB was not classified as a PN17 company.

D

**[30]** The applicants are in the civil and building construction industry which had been badly affected by the various Movement Control Orders and the COVID-19 pandemic. The applicants were hard hit by construction delays and cash flow issues, and where the first applicant would have then slipped into E PN17 classification, were it not for the PN17 relief measures applicable until 29 December 2021.

**[31]** Nonetheless, because of the deterioration of its financial performance, F the TBCB Group has been facing various legal suits, including winding up petitions as of 2018.

*December 2020: Leave order for holding of scheme meetings and restraining order*

G **[32]** On 31 December 2020, this court granted leave ('leave order') for the applicants to summon scheme meetings of the creditors of the applicants or any class of them ('scheme creditors'). The court also granted a restraining order in favour of the applicants Through extensions, the restraining order was in place until 31 December 2021.

H

**[33]** On 9 February 2021, the first respondent, Seng Long filed its notice of application to intervene (encl 12) in these scheme proceedings.

**[34]** Subsequently on 23 March 2021, the leave order was extended for a I further period of three months from 31 March 2021.

**[35]** On 11 May 2021, the TBCB Group announced that with the assistance of TA Securities Holdings Bhd, the TBCB Group wished to undertake a private placement of up to 20% of the total number of issued shares of TBCB to third

party investor(s) to be identified later and at an issue price to be determined later ('private placement'). On 25 May 2021, with the assistance of TA Securities Holdings Bhd, the TBCB Group announced that Bursa Securities had approved the private placement.

**[36]** On 29 June 2021, the leave order was further extended for a further three months from 30 June 2021.

*First POD exercise deadline by 31 May 2021 and second POD exercise deadline by 9 July 2021*

**[37]** The first proof of debt exercise was commenced on 28 April 2021 ('first POD exercise'), whereby the scheme creditors were notified to submit their proof of debt forms ('POD') via post, hand delivery and/or email by 31 May 2021.

**[38]** To provide maximum opportunity for all the scheme creditors to put in their POD, the second proof of debt exercise ('second POD exercise') was commenced on 25 June 2021, whereby all unsecured scheme creditors who had not submitted their POD claims were notified to submit their POD by 9 July 2021. The applicants also updated this court on the second POD exercise through the applicants' affidavit affirmed on 11 August 2021.

**[39]** Since its intervention, Seng Long has raised the following objections to the proposed scheme of arrangement through its various affidavits and written submissions filed before this court:

(a) intercompany and/or related creditors are classified with all other unsecured scheme creditors;

(b) objections towards the manner in which the proof of debt ('POD') exercises ('POD exercises') were carried out ie the process, timeline for adjudication and mechanism for appeal;

(c) objection to the extension of the deadline for the POD exercise;

(d) the inspection of and adjudication process of PODs should be disclosed;

(e) that TBCB triggers the PN17 criteria, and any statements by the applicants claiming otherwise is misleading;

(f) that Seng Long (and other unsecured scheme creditors') legal rights will be prejudiced as the scheme of arrangement results in extinguishment of their rights to claim against the applicants;

(g) challenged the liquidation analysis as prepared by the applicants' financial advisors;

(h) identities of the creditors excluded from the Scheme of Arrangement not identified and/or explained;

(i) Nomination of the independent director pursuant to s 362(2)(d) of the Companies Act 2016 ('the CA 2016') appear to be orchestrated by the applicants and/or directors in companies which they hold substantial shareholders;

(j) insufficient details provided in relation to the White Knight Investor and funding is on a speculative basis; and

(k) objection to the debt repayment through 10% repayment through monies and 20% through the issuance of TBCB ordinary shares to the unsecured scheme creditors. Claims there is no basis for the purportedly arbitrary repayment amount.

**[40]** This court, having considered Seng Long's objections, had nonetheless granted the Orders for an extension for leave to convene the court convened meetings and the extension of the restraining order. Seng Long had never appealed against the High Court orders granted on 23 March 2021 (encl 39), 29 June 2021 (encl 71) or 22 September 2021 (encl 100).

*August 2021: Issuance of the scheme documents and the notices adjudicating the proofs of debt ('POD')*

**[41]** On 4 August 2021, the notices of the scheme meetings, the notice of adjudication from the POD exercise, and the relevant Explanatory Statement ('scheme documents') were sent by the applicants to all the known addresses by AR registered post and all the known email addresses of the unsecured scheme creditors. The notices of the scheme meetings were also advertised in both the *Berita Harian* and the *New Straits Times* on 4 August 2021.

**[42]** In accordance with para 9 of the schemes of arrangement as explained in the Explanatory Statements, the unsecured scheme creditors were given eight days from 4 August 2021 to give written notice ('dispute notice') to the scheme chairman ('dispute period'). The dispute notice must include a written request for the independent assessor, Rodgers Reidy ('independent assessor'), to decide on the dispute in relation to the adjudicated value of the relevant scheme creditor's POD by the scheme chairman.

**[43]** The independent assessor was to reply no later than seven days (or such date as reasonably required) after being provided with the relevant POD and information, by way of written notice of the decision to parties to the dispute.

**[44]** As a summary, there were the following dispute notices received by the independent assessor:

(a) TBCB: one dispute notice (submitted out of time);

(b) IJSB: five dispute notices; and

(c) IESB: no dispute notices.

**[45]** All unsecured scheme creditors were also asked to provide their proxy/attendance forms by 5pm on 23 August 2021.

**[46]** The applicants also made available to all unsecured scheme creditors copies of the scheme documents at the registered office of the first applicant at Nos 35, 37 and 39, Jalan PJU 1A/41B, Pusat Dagangan NZX, Ara Jaya, 47301 Petaling Jaya, Selangor Darul Ehsan. None of the unsecured scheme creditors attended the first applicant's registered office to request for hardcopies of the scheme documents.

*Summary of the terms of the debt restructuring under the three schemes of arrangement*

**[47]** In essence, each of the applicants are advancing a separate scheme of arrangement: being the TBCB Scheme, the IJSB scheme and the IESB Scheme. The terms of each of the schemes are largely similar.

**[48]** As contained in each of the Explanatory Statement ('ES') for the TBCB Scheme, the IJSB scheme and the IESB Scheme, the terms of the debt restructuring proposed to the unsecured scheme creditors are briefly as follows:

(a) on the effective date, the applicants shall settle the unsecured scheme creditors debt as per the adjudicated POD claims ('adjudicated debt') as follows:

(i) 10% of the unsecured scheme creditors' adjudicated debt as at the cut-off date, shall be paid in cash within seven business days from the issuance of TBCB ordinary share Capital to all unsecured scheme creditors in proportion to the total adjudicated debt as at the cut-off date;

(ii) 20% of the unsecured scheme creditors' adjudicated debt as at the cut-off date, shall be converted into TBCB ordinary share capital; and

(iii) for the purposes of the success of this scheme and the applicants' working capital, the intercompany creditors (as defined in the ES) will relinquish all entitlement rights to the settlement for the benefit of the Group's working capital and operating expenses requirement.

(b) the remaining 70% of the unsecured scheme creditors' adjudicated debt as at the cut-off date and any amount incurred and claim thereafter shall be waived as at the lodgement date; and

(c) any corporate guarantee claims against the applicants that have already been resolved and settled under any of the other schemes, shall be deemed full and final settlement, and will not be entitled for settlement under that respective applicant's scheme.

**[49]** In particular, the IJSB scheme and the IESB Scheme are inter-conditional to each other. On the other hand, the TBCB Scheme is not inter-conditional on either of the IJSB scheme or the IESB Scheme.

*Scheme meetings held on 26 August 2021*

**[50]** On 26 August 2021, the scheme meetings for IJSB, IESB and TBCB were held at 10am, 12.30pm and at 3pm respectively.

**[51]** The scheme meetings proceeded virtually. The broadcast venue was at Nos 35, 37 and 39, Jalan PJU 1A/41B, Pusat Dagangan NZX, Ara Jaya, 47301 Petaling Jaya, Selangor. The virtual meeting service provider was Dvote Services Sdn Bhd ('Dvote').

**[52]** In summary, the schemes of arrangement were passed in the following manner:

| No | Applicant | Approval by Percentage Value of Creditors Present and Voting % |
|---|---|---|
| 1. | TBCB | 75.09 |
| 2. | IJSB | 80.90 |
| 3. | IESB | 100.00 |

*IJSB scheme meeting*

**[53]** As a result of the adjudication process and the dispute notices before the independent assessor, some updates were made to the scheme debts as listed in the Appendix A.1 of the ES.

**[54]** However, since the IJSB scheme meeting, the scheme chairman had managed to adjudicate PODs submitted past the relevant deadline. These different tranches of PODs submitted and adjudicated means that the figures for the total debts would have to be revised if there are to be accepted by this court.

**[55]** 80.90% in value of the unsecured scheme creditors (amounting to

RM321,852,260) present and voting, voted in favour of the proposed scheme of arrangement.

*IESB scheme meeting*

**[56]** 100% in value of the unsecured scheme creditors (amounting to RM78,403,035 of the scheme debts) present and voting, voted in favour of the proposed scheme of arrangement.

*TBCB scheme meeting*

**[57]** 75.09% in value of the unsecured scheme creditors (amounting to RM44,359,824 of the scheme debts) present and voting, voted in favour of the proposed scheme of arrangement.

*Three tranches of PODS submitted to the applicants and adjudicated*

**[58]** As indicated above, there were three tranches of PODs submitted to IJSB for the purposes of IJSB's scheme within the POD exercise deadline

| | Tranche of PODs (for IJSB Scheme only) | RM |
|---|---|---|
| Tranche 1 | First POD and second POD (submission up to 9 July 2021) | 402,785,320.79 + 13,733,853.17 |
| Tranche 2 | Nine PODs submitted after 9 July 2021 but before the IJSB scheme meeting | 5,544,584.32 |
| Tranche 3 | Three PODs submitted and adjudicated after the IJSB scheme neeting | 1,153,823.02 |
| | TOTAL | 423,217,581.30 |

**[59]** The adjudication and admission of the PODs are significant for two reasons. First, for the PODs submitted before the scheme meetings, for those PODs to allow the scheme creditors to be present and to vote at the scheme meetings. Second, and more significantly, the PODs must be admitted in order for the scheme creditors to have any entitlement for distribution under the schemes of arrangement (if the schemes are sanctioned).

**[60]** For the Tranche 2 PODs, the creditors and their adjudicated debts are:

| Tranche 2: Past second POD deadline and before IJSB scheme meeting | | |
|---|---|---|
| No | Creditor | Adjudicated amount (RM) |
| 1 | SEM Civil & Structure | 1,674,387.05 |
| 2 | Sunshine Piling Engineering Sdn Bhd | 177,906.25 |

| | | |
|---|---|---|
| 3 | Geodata Engineering Sdn Bhd | 547,355.26 |
| 4 | Lee Thong Thong | 111,659.95 |
| 5 | Strainstall Malaysia Sdn Bhd | 1,153,956.90 |
| 6 | Bofi (M) Sdn Bhd | 779,116.93 |
| 7 | TCP Express Sdn Bhd | 316,546.00 |
| 8 | Soil Instruments (M) Sdn Bhd | 629,703.98 |
| 9 | Virtual Victory Sdn Bhd | 153,952.00 |
| | TOTAL | 5,544,584.32 |

**[61]** For the Tranche 3 PODs, the creditors and their adjudicated debts are:

| Tranche 3: Past the IJSB Scheme Meeting | | |
|---|---|---|
| No | Creditor | Adjudicated amount (RM) |
| 1 | Aik Hin Petroleum | 390,283.54 |
| 2 | Antah Schindler | 239,858.52 |
| 3 | 3 Selisa Synergy | 523,680.96 |
| | TOTAL | 1,153,823.02 |

**[62]** In relation to the Tranche 2 and Tranche 3 PODs, the applicants have, in good faith, completed the adjudication and admitted these debts. However, the applicants are seeking these debts are to be treated as part of the schemes of arrangement. If the Tranche 2 and Tranche 3 PODs are rejected, these claims are not eligible for distribution if the schemes are sanctioned.

*Events taking place after scheme meetings: further to the overall debt restructuring of the applicants*

**[63]** On 12 October 2021, a share capital reduction of the issued share capital pursuant to s 116 of the Companies Act 2016 which entailed the reduction and cancellation of RM150m of the issued share capital of TBCB which is lost or unrepresented by available assets was effected. The corresponding credit of RM150m arising from the share capital reduction was used to eliminate the accumulated losses of TBCB. The share capital reduction was completed on 12 October 2021.

**[64]** On 14 October 2021, TBCB made the Bursa Malaysia Bhd announcement that the private placement has been completed following the listing and quotation of 37,000,000 placement shares on the Main Market of Bursa Securities. A private placement raised approximately *RM5,891,600* as additional working capital was also completed on the same day. A representative of the White Knight, Mr Ng Chye Poh, is currently the Executive Director for TBCB. The other, Mr Yip Chin Hwee, had also

subscribed to the private placement exercise in 29 June 2021 for 20 million shares at RM0.05.

**[65]** On 26 October 2021, TBCB made a Bursa announcement that there was a delay in the issuance of the audited accounts. The delay in the issuance of Annual Report 2021 was mainly due to extensive time taken by the new management team to assess the adequacy in the information/documents required for finalising the audited financial statements of the TBCB Group.

**[66]** As a result of the ongoing restructuring process and the lengthy adjudication of debt procedure in the schemes, the adjudicated figures were also presented to the auditors and is interconnected with the audit. The schemes have resulted in a lengthier and more complicated audit process as the auditors wanted to ensure that this exercise would reflect an accurate position of the company

*The six opposing scheme creditors and their grounds of objections*

**[67]** The opposing scheme creditors have raised various arguments against the sanction of the schemes of arrangement. A summary is as follows:

(a) objections towards the acceptance of the late submissions of PODs, and extension of the POD deadline;

(b) classification of the creditors is incorrect, where intercompany and/or related creditors should be separately classed or have their votes discounted down to zero;

(c) the applicants' Schemes were originally inter-related/inter-conditional, and the applicants' have taken a 'significant change in position' from the original draft Explanatory Statement;

(d) insufficient disclosure or details provided in relation to the White Knight investor's fund-raising exercise and quantum of funding to be provided by the White Knight;

(e) TBCB has triggered PN17, or TBCB's purported PN17 status;

(f) creditors' have a right to inspect other creditors' POD forms;

(g) director's notice on personal interest is misleading;

(h) lack of disclosure or explanation as to which creditors are excluded from the scheme (under Appendix H of the Explanatory Statements);

(i) a creditor with a claim against a company pursuant to a corporate guarantee should be classified separately from other unsecured scheme creditors;

(j) mo audio or visual platform for conducting the Q&A session during the scheme meetings and technical issues faced by one creditor. Allowed the applicants to 'bulldoze' through the schemes; and

(k) applicants' are hopelessly insolvent and it is against public policy to sanction the schemes.

**[68]** Having set out the relevant background and summary of the legal objections raised in this sanction application and before dealing with the merits or otherwise of the objections raised, it is helpful to first deal with the general principles applicable for sanction of a scheme of arrangement.

*General principles for sanction of scheme*

**[69]** The s 366 process under the CA 2016 (previously s 176 of the Companies Act 1965 ('the CA 1965')) is designed to save companies in difficulty. The process aims to assist the restructuring of a company heavily burdened with debts. I have in *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327 ('Re Top Builders') opined on the utilitarian philosophy underlying the provision — that the greater good of many will outweigh the interests of a few in schemes of arrangement.

**[70]** Sections 366(3), (4), (5), (6) and (7) of the CA set out the power of the court to convene a meeting of the creditors and the power to grant approval to a scheme of arrangement:

> 366 Power of Court to order compromise or arrangement with creditors and members
>
> (3) The compromise or arrangement shall be binding on:
>
> (a) all the creditors or class of creditors;
>
> (b) the members or class of members;
>
> (c) the company; or
>
> (d) the liquidator and contributories, if the company is being wound up,
>
> *if the compromise or arrangement is agreed by a majority of seventy-five per centum of the total value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy* at the meeting or the adjourned meeting *and has been approved by order of the Court.*
>
> (4) *The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just.*
>
> (5) An order under subsection (3) shall have no effect until an office copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such earlier date as the Court may determine and as may be specified in the order.

(6) *Subject to subsection (7),* a copy of every order made under subsection (3) shall be annexed to every copy of the constitution of the company issued after the order has been made, or in the case of a company not having a constitution, to every copy of the instrument issued constituting or defining the constitution of the company.

(7) *The Court may, by order, exempt a company from complying with the requirements of subsection (6) or determine the period during which the company shall comply with the requirements.* (Emphasis added.)

**[71]** The key guiding principles applicable to sanction by the court of a scheme of arrangement are as follows:

*Element 1*: The statutory requirements set out in s 366 of the CA 2016 must have been complied with;

*Element 2*: The creditors must have been fairly represented in the court convened meeting and the majority of the creditors voting in favour of the scheme must have been acting bona fide; and

*Element 3*: The proposed scheme of arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

**[72]** These are derived from the following authorities:

(a) the High Court decision of *Sentoria Bina Sdn Bhd v Impak Kejora Sdn Bhd & Ors* [2021] 12 MLJ 690; [2021] 9 CLJ 814 ('Sentoria') where Anand Ponnudurai JC considered the following factors:

*Has there been compliance with the requirements of s 366?*

[43] I am satisfied that the *applicant has duly complied with the previous orders of court wherein they have complied with all advertisement and service requirements pursuant to ss 366 and 369 of the CA.*

...

[45] Further, it is also an undisputed fact, that *the class of creditors in regard to the proposed scheme of arrangement are properly classified.* All the scheme creditors (in one single class) are the applicant's unsecured trade creditors that share the similar legal rights in regard to the applicant. It should be noted that none of the interveners have challenged or raised any issues in regard to the classification of the scheme creditors.

*Is this a scheme that an intelligent and reasonable man would approve?*

[46] The next issue to consider is w*hether the scheme as proposed is a scheme that an intelligent and reasonable man would approve or is the scheme speculative as contended by some of the interveners.* (Emphasis added.)

(b) the High Court decision of *TH Heavy Engineering Bhd & Ors* [2018] MLJU 466 (HC) where Noorin Badaruddin J set out the key guiding principles when the court approves a scheme of arrangement (at para 150 of the judgment):

> [150] ... this court must not 'second-guess' the commercial decisions made by the scheme creditors of the applicants. The reasonableness of the compromise or arrangement is to be considered. At the heart of the matter, the compromise or arrangement must be capable of being accepted. In the present applications by the applicant before this court, the scheme is far from being illusory or near illusory.

(c) the High Court decision of *Re Sateras Resources (Malaysia) Bhd* [2005] 6 CLJ 194 (HC) ('Re Sateras'), where Ramly J (as he then was) adopted the principles found in *Buckley on the Companies Act* (14th Ed, 1981) (at p 201 of the judgment):

> In exercising its power of sanction the court will see, first, that *the provisions of the statute have been complied with*, second, that the *class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonable approve* (sic).
>
> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, at the same time, the Court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme. (Emphasis added.)

**[73]** In *Airasia X Bhd v BOC Aviation Ltd & Ors* [2021] 10 MLJ 942 ('AirAsia X') at [41], I had also referred to the English Chancery Court decision of *Re Telewest Communications plc (No 2); Re Telewest Finance (Jersey) Ltd (No 2)* [2005] 1 BCLC 772 ('Re Telewest') where the rationale for the guiding principles cited above was set out:

> [20] The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012,; [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions ...
>
> In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority were acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class

> concerned and acting in respect of his interest, might reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.
>
> [21] This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under s 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'. *That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme*. Necessarily *there may be reasonable differences of view on these issues.*
>
> [22] The second factor recognised by the above-cited passage is that in *commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'*. (Emphasis added.)

**[74]** Having set out the key guiding principles, I will now examine if these have been met by the applicants in their respective schemes of arrangement taking into consideration the relevant objections raised in this application.

*Compliance with statutory requirements*

**[75]** The first element is for the applicants to satisfy this court that it has met with all the statutory requirements.

*Jurisdictional issue from convening stage: Classification of creditors*

**[76]** At the earlier convening stage when making the leave order, this court was appraised of the classification of creditors. At the convening stage, Seng Long had challenged the classification of creditors where the applicants would each only have a single class of unsecured creditors.

**[77]** In *AirAsia X*, I have addressed the test of classification of creditors in a scheme of arrangement at [50]–[65] which are summarised as follows:

(a) the classic test for identifying classes is formulated by Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 ('Sovereign Life') that a class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest';

(b) the test is based on similarity or dissimilarity of legal rights against the company and not on similarity or dissimilarity of interest not derived from such legal rights (see: *Re Telewest* and *Re UDL Holdings Ltd & Ors* [2002] 1 HKC 172 ('UDL Holdings'). The fact that individuals may hold divergent views based on their private interest not derived from their legal rights against the company is not a ground to be classified separately;

(c) the established and prevailing approach is to break the question into a two-stage test.

(i) whether there is any difference between the creditors inter se in their strict legal rights; and

(ii) if there is, to postulate by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interests or subjective motivations operating in the case of any particular creditors.

Following the Scottish Court of Session (Outer House) decision of *Petition of Premier Oil PLC and Premier Oil UK Ltd for sanction of schemes of arrangement* [2020] CSOH 39 ('Premier Oil Plc') the two-stage test was clarified at [64] as follows:

(a) at the first stage, the court considers the legal rights of the relevant creditors:

(i) the existing rights against the company, which are to be released or waived under the scheme; and

(ii) the new rights (if any) which the scheme gives to those whose rights are to be released or waived.

(b) if there is no material difference between the legal rights of the relevant creditors, they will form a single class. And there is no need to proceed to the second stage of the test;

(c) if there are material difference between the legal rights of the relevant creditors, at the second stage the court needs to assess the relevance of those differences; and

(d) a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest in order to avoid the unnecessary proliferation of classes.

Further, following *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 ('TT International') and *Pathfinder Strategic Credit LP and Another v*

*Empire Capital Resources Pte Ltd and Another Appeal* [2019] 2 SLR 77; [2019] SGCA 29, the court should identify the appropriate comparator, assess the relative positions of the creditors under the proposed scheme against their relative position in the comparator, and compare the extent of differences, if any.

*Subsidiaries creditors ought to be classed separately*

**[78]** The applicants have listed all creditors under the IJSB scheme, including the first applicant, third applicant and the second applicant's wholly-owned subsidiary (IJ Geotechnic Sdn Bhd) ('related company creditors') as unsecured scheme creditors.

**[79]** Learned counsel for Seng Long and SESB contended that these related company creditors ought to have been put in a separate class of creditors from the other unsecured scheme creditors.

**[80]** It is contended that in determining whether the related company creditors ought to be included together in one group with the unsecured scheme creditors or categorised as a separate group under the IJSB scheme, this court must compare:

(a) the related company creditors' existing legal rights to those of the other unsecured scheme creditors' legal rights without either the proposed scheme of arrangement or the liquidation scenario:

> (i) The Related Company Creditors and other Unsecured Scheme Creditors should amount to unsecured creditors having similar legal rights to claim against the second applicant should there be no liquidation scenario or proposed scheme of arrangement.

(b) the related company creditors' rights under the terms of the proposed scheme of arrangement as compared to the rights of other unsecured scheme creditors':

(i) in this regard, para 3.2.4 (iii) of the second applicant's Explanatory Statement reads:

> For the purposes of the success of this Scheme and the Company's working capital, the Intercompany Creditors will relinquish all entitlement rights to the settlement for the benefit of the Group's working capital and operating expenses requirement ...

(ii) thus, the related company creditors' existing legal rights to the adjudicated debt will be relinquished under the Proposed Debt Resolution of the IJSB scheme, with a debt recovery rate of 0%;

(iii) as for the other unsecured scheme creditors, paras 3.2.4 (i), (ii) and

A 3.2.5 reads:

> 3.2.4 On Effective Date, the Company shall settle the Unsecured Scheme Creditors debt as per the adjudicated POD claims ('Adjudicated Debt') as follows:
>
> B (i) 10% of the Unsecured Scheme Creditors' Adjudicated Debt as at the Cut-Off Date, shall be paid in cash within 7 business days from the issuance of TBCB Ordinary Share Capital in paragraph 3.2.4(ii) to all Unsecured Scheme Creditors in proportion to the total Adjudicated Debt as at the Cut-Off Date.
>
> C (ii) 20% of the Unsecured Scheme Creditors' Adjudicated Debt as at the Cut-Off Date, shall be converted into TBCB Ordinary Share Capital. The terms of TBCB Ordinary Share Capital are set out in Appendix B.
>
> D ...
>
> 3.2.5 The remaining 70% of the Unsecured Scheme Creditors' Adjudicated Debt as at the Cut-Off Date and any amount incurred and Claim thereafter shall be waived on Lodgement Date.

E (iv) it is clear that for the unsecured scheme creditors, which include Seng Long and SESB, the debt recovery rate would be 30% (10% of the adjudicated debt to be in cash and 20% to be converted into ordinary share capital of the first applicant). With respect to legal rights for the balance of the monies due as debt ie 70% of the
F adjudicated debt, and any amount incurred and claimed that is to be treated under the IJSB scheme as waived;

(v) on the other hand, the legal rights of the related company creditors and those of the other unsecured scheme creditors to the
G adjudicated debt under the IJSB scheme is different, being 0% as opposed to recovery of 30%; and that the interest of the related company creditors derived from waiving of their legal rights to the whole adjudicated debt is borne out of their overriding objective to see the continuity of the second applicant's business as a going
H concern, whereas the interest of unsecured scheme creditors, is tied to monies, to be recovered ie full recovery of the adjudicated debt; and

(vi) accordingly, it is contended that the related company creditors have different rights, interests and position when compared to the
I unsecured scheme creditors and there can no sensible consultation between the respective sides with a view to a common interest since the related company creditors are not looking to recover any monies but are motivated to secure the schemes for the benefit of the applicants, and not by way of a true exercise of their own rights.

(c) the related company creditors' rights in the comparator (liquidation scenario) to those of the other unsecured scheme creditors':

> (i) Should the second Applicant go into liquidation, the Related Company Creditors would have legal rights similar to those of other Unsecured Scheme Creditor, and would rank *pari passu* with other Unsecured Scheme Creditors.

(d) as to whether the position of the related company creditors and the unsecured scheme creditors under the IJSB scheme mirrors their position in the comparator (liquidation scenario):

> (i) It was contended that the position of the Related Company Creditors and other Unsecured Scheme Creditors under the scheme of arrangement does not mirror their respective positions in a liquidation scenario. The Unsecured Scheme Creditors' concern is the amount of monies that can be recovered as compared to the interest of the Related Company Creditors which is the continuity of the second Applicant's business as a going concern.

**[81]** Premised on the above, learned counsel for Seng Long and SESB contended that the legal rights of the related company creditors and the unsecured scheme creditors are different such that they cannot sensibly consult together with a view to their common interest derived from their legal rights.

**[82]** Learned counsel for the fourth respondent, SESB added further that in relation to the PODs submitted as stated in the ES, a substantial amount of debts involved intercompany creditors or related party creditors.

**[83]** More specifically, item 3.1 of the ES, states that 'all unsecured creditors including the related/associate companies have been classified together in a single class as these creditors have identical legal rights to recourse against IJSB' and Item 3.2.4(iii) of the ES states that '... intercompany creditors will relinquish all entitlement rights to the settlement for the benefit of Group's working capital and operating expenses requirement'.

**[84]** Since the intercompany creditors (TBCB and IESB) are not making claims against IJSB, they should be no reason for them to remain as an 'unsecured creditor' and instead should be subjected to a different treatment and be placed in a different class and/or category of creditors.

**[85]** Separately, SESB also contended that they should be classified differently from the unsecured scheme creditors. This is based on the fact that SESB's adjudicated debt is secured by a corporate guarantee issued by TBCB.

**[86]** According to learned counsel for SESB, under Item 10.2 (Compromise, Release and Discharge) of the ES, TBCB will be discharged as a corporate guarantor effective from lodgement date. This will essentially

extinguish SESB's entire claim against TBCB if the scheme for IJSB is pushed through. However, since SESB's claim is secured by a corporate guarantee, SESB should not be classified as an unsecured creditor whose debt is subjected to a haircut. SESB should in fact be classified as an 'excluded creditor' and be entitled to full payment.

*Court's deliberation*

**[87]** On 31 December 2020, this court granted leave for the applicants to convene the scheme meetings based on the current classification of creditors. Leave continued to be extended on 23 March 2021 and 29 June 2021.

**[88]** All unsecured scheme creditors were classified in one single class for the purposes of voting and distribution under each scheme. Whilst it is true that the court's determination at the leave stage is not final (see [49] of *AirAsia X*, citing the English High Court decision of *Re Apcoa Parking Holdings GmbH and others* [2015] 2 BCLC 659 ('Re Apcoa') at [42]–[43]), nevertheless, the court ought to be slow to depart from its earlier determination unless there are any material changes in circumstances or fresh consideration placed before the court. See *Re Apcoa* at [43] and the English High Court decision of *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch) at [72]:

> [72] The purpose of the change of practice introduced pursuant to the observations of Chadwick LJ in *Re Hawk*, and now embodied in the Practice Statement, was and remains to accelerate to the first stage (at the Convening Hearing) consideration by the Court of the issue of class composition. *Whilst the Court's decision at that stage is not final, the applicant has a legitimate expectation that, unless circumstances materially alter or fresh considerations are put before it which the Court accepts should be addressed, the Court will not of its own motion change its mind, since (as I put it in In re APCOA Parking Holdings GmbH (No 2) 'to do so would subvert the purpose of the revised practice ':and see also In re Hawk itself at [21] and Re Global Garden Pructs Italy SpA* [2017] BCC 637; [2016] EWHC 1884 (Ch) *at [43].* (Emphasis added.)

**[89]** In this instant case, the appropriate comparator is the liquidation scenario, assessing the relative positions of the creditors under the proposed scheme against their relative position in the liquidation scenario and compare the extent of differences, if any.

**[90]** Following the aforesaid, it cannot be denied that both the related company creditors and the unsecured scheme creditors share similar legal rights against IJSB in relation to their debts. Under the IJSB scheme, both the related company creditors and the unsecured creditors would be settled in a similar fashion, namely, 10% of the adjudicated debts to be paid in cash and

20% to be converted into TBCB ordinary share capital. The balance 70% would be waived or extinguished.

**[91]** The rights accorded to the related company creditors and the unsecured creditors in the event of liquidation are also similar in that both would only be paid *pari passu* from the surplus funds of IJSB, if any.

**[92]** Seng Long's main contention rests on the fact that the related company creditors have voluntarily agreed to waive the payment of their entitlements under the IJSB scheme. The thrust of the submission is that with the waiver, the related company creditors are no longer interested in the recovery of their adjudicated debts but more on ensuring the continuity of the TBCB Group. This, it is submitted, means that both the related company creditors and the unsecured creditors would have different rights, interests and position and there can be no sensible consultation between them with a view to a common interest since the related company creditors are not looking to recover on any monies but are motivated to secure the scheme for the benefit of the applicants, and not by way of a true exercise of their own rights.

**[93]** With respect to learned counsel for Seng Long, I am unable to agreed with his contention. Thinking logically, the effect of his contention is this — if the related company creditors had not agreed to voluntarily waive their entitlements under the scheme, there would be no objections to the related company creditors to be placed in the same class as the unsecured creditors. This seems to me to be a strange consequence as the waiver of the entitlements to the IJSB scheme by the related company creditors only serves to benefit the creditors as a whole and yet it would result in the related company creditors to be treated separately from the other unsecured creditors.

**[94]** Furthermore, the classification of the creditors is based on similarities or dissimilarities of legal rights and not commercial interests. Learned counsel for Seng Long has not been able to demonstrate that the legal rights for both the related company creditors and the unsecured creditors in respect of their respective adjudicated debts are dissimilar in nature. The fact that the related company creditors have voluntarily agreed to waive their entitlements does not mean that their legal rights under the scheme are not similar to the unsecured scheme creditors'.

**[95]** I also find that the contention by SESB that they ought to be treated differently from the unsecured scheme creditors to be without merits. SESB does not hold any charge, security or any other proprietary interest that would give rise to a proprietary claim against TBCB nor IJSB to justify placing them in any other class other than unsecured creditors.

**[96]** Thus, I hold that the classification of creditors under the IJSB scheme is correct. All of the unsecured scheme creditors and the related company creditors have the same legal right of recourse against the applicants. Similar to my finding at para [336] of *AirAsia X*, there is nothing to suggest that the related company creditors' rights are any different from the other creditors in its class to warrant placing them in a different class.

**[97]** The next challenge is raised by SESB in terms of the unsecured scheme creditors in the IJSB scheme being made to release their corporate guarantee.

**[98]** In particular, SESB complained that under para 10.2 of the IJSB ES, TBCB will be discharged as a corporate guarantor effective on the lodgement date. SESB claimed that this would extinguish SESB's entire claim against TBCB if the IJSB scheme is sanctioned. SESB further claimed that it has a secured claim against TBCB under the corporate guarantee.

**[99]** It is established in law that a scheme of arrangement between a scheme company and its creditors may discharge not only the debts and liabilities of the scheme company but also the debts and liabilities of the guarantors for the same debts and liabilities.

**[100]** In *Sentoria*, the High Court referred to a series of authorities such as the High Court decision of *Re Khondker Yarad Ahmed; ex p MIDF Amanah Ventures Sdn Bhd* [2016] 3 CLJ 637 and the Singapore Court of Appeal decision in *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 4 SLR 35 and concluded that a scheme of arrangement can discharge the scheme company and guarantors from all debts and liabilities. See [83]–[87] of the judgment.

**[101]** Therefore, under the IJSB scheme, the applicants are allowed to discharge TBCB as a corporate guarantor for SESB's claim against IJSB.

**[102]** A sixth corporate guarantee dated 13 September 2019 was signed by TBCB to combine the previous five corporate guarantees. The claim against TBCB under corporate guarantee No 6 is limited to the maximum sum of RM12m. Hence, SESB's claim in the TBCB Scheme was only admitted up to the debt sum of RM12m.

**[103]** SESB also alleged that as its claim under the IJSB scheme is 'secured' by a corporate guarantee, it should not be included into the IJSB scheme. It should be paid in full and not be compelled to accept a haircut on its claim.

**[104]** With respect, SESB has a mere unsecured and contingent claim

against IJSB. The corporate guarantee does not provide SESB any charge or security over the assets of TBCB, hence SESB is not a secured creditor. Therefore, the mere existence of a corporate guarantee over SESB's claim does not justify it from being excluded from the scheme or to be placed in a separate class.

**[105]** A similar argument was raised in *Transmile.* In this case, two companies, TAS and TGB, had sought the court's sanction to implement schemes of arrangements between each of them and their respective creditors. TAS was the main subsidiary of TGB and was the principal borrower to some of its creditors. TGB was the guarantor of some of these loans granted or assigned to TAS.

**[106]** MTB was an unsecured creditor of TAS and was placed in the same class as two other groups of unsecured creditors, STL and CB SPV, whose unsecured debts were guaranteed by TGB.

**[107]** During the sanction hearing, MTB sought to argue that it should be classified differently from STL, CB SPV and TGB because the latter entities had personal or special interests. STLs and CB SPV would enjoy additional benefits as they were entitled to claim from TGB under the guarantees. Nonetheless, the High Court disagreed with MTB's arguments.

**[108]** The High Court held that the additional benefit or interest that STL and CB SPV enjoyed under the TGB Scheme arose by reason of the different capacity that they enjoyed as creditors of TGB under the guarantee, which MTB did not. This in itself did not however warrant different treatment of MTB and the other scheme creditors. In so far as the one common scheme under which they were all unsecured creditors was concerned, namely the TAS Scheme, the legal rights and benefits enjoyed by each of them as members within a class was the same, satisfying the test that it was possible for them as class members to consult together with a view to their common interest.

**[109]** By applying *Transmile* to the facts, it is my judgment that SESB is correctly classified under IJSB's Scheme as its legal rights against IJSB is the same as the other unsecured scheme creditors.

*Procedural requirements for scheme meetings*

**[110]** Next, it was contended that the procedural requirements have not been met in the lead up and the holding of the scheme meetings.

**[111]** As stated above, on 4 August 2021, the scheme documents were sent by the applicants to all the known addresses by AR registered post and all the

known email addresses of the unsecured scheme creditors.

**[112]** The notices of the scheme meetings were also advertised in the both the *Berita Harian* and the *New Straits Times* the same day.

**[113]** As alluded to above, the applicants also made available to all unsecured scheme creditors copies of the scheme documents at the registered office of the first applicant at No 35, 37 and 39, Jalan PJU 1A/41B, Pusat Dagangan NZX, Ara Jaya, 47301 Petaling Jaya, Selangor Darul Ehsan.

**[114]** In accordance with para 1 of Annexure A of the order dated 31 December 2020 ('encl 11') on 26 August 2021, the scheme meetings IJSB, IESB and TBCB were held virtually at 10am, 12.30pm and at 3pm respectively ('scheme meetings'). The broadcast venue was at No 35, 37 and 39, Jalan PJU 1A/41B, Pusat Dagangan NZX, Ara Jaya, 47301 Petaling Jaya, Selangor.

**[115]** The schemes of arrangement were passed with the requisite 75% majority in value of creditors present and voting, in the following manner:

| No | Applicant | Approval by Percentage Value of Creditors Present and Voting % |
|---|---|---|
| 1 | TBCB | 75.09 |
| 2 | IJSB | 80.90 |
| 3 | IESB | 100.00 |

*Opposing scheme creditors challenge the disclosure in the Explanatory Statement*

**[116]** Under s 369 of the CA 2016, the applicant company is required to issue an explanatory statement to the members and creditors of the company to explain the effect of the scheme of arrangement and to state any material interests of directors, whether as directors or as members or as creditors of the company or otherwise, and the effect of the compromise or arrangement so far as it is different from the effect on the similar interests of other persons.

**[117]** The s 369 requirement is in pari materia with s 897 of the UK Companies Act 2006 and s 412 of the Australian Corporations Act 2001.

**[118]** Learned counsel for SESB raised the following points in support of his contention that the disclosure in the ES in the present case is inadequate:

(a) there was a significant change of position, from when the application was filed to the time when the ES were forwarded in respect of how the Intercompany Creditors/related company creditors are to be dealt with. More specifically, in the ES, it is stated that the schemes for IJSB and IESB are not dependent on TBCB Scheme. Item 5 of the ES states that

the IJSB scheme is not conditional on the implementation of the TBCB Scheme but IJSB scheme and IESB Scheme are inter conditional on each other. When the application was filed, the representation made was that all three Schemes were inter dependent. There is a change of the applicants current position as reflected in the ES, which, it is contended, is not legitimate;

(b) the financial records submitted in support of this application do not reflect the value of the intercompany creditors/related company creditors' debts as stated in the list of creditors in the ES;

(c) under Appendix H of the ES which lists the excluded creditors, there is mention of 'Project Creditors'. All creditors under Appendix H are excluded from the scheme and thereby stand to be paid in full. The identity of these creditors and the selection criteria are not adequately disclosed in the Explanatory Statements; and

(d) Sykt Logam Unitrade (creditor's list No 144) reflects a proof of debt of RM24,539,357 and supported the IJSB scheme by voting in favour at the court convened meeting. SESB was subsequently informed that Sykt Logam Unitrade and the applicants had entered into a consent judgment. The terms of the consent judgment and any subsequent arrangement between those parties were not disclosed when this application was made and which appear to be a private commercial arrangement between a scheme creditor and the companies.

*Court's deliberation*

**[119]** In *Re Sateras*, the court discussed the standard of disclosure required by an applicant company to its creditors. The principles set out by the court after referring to a series of authorities are in summary as follows:

(a) the company should furnish full information to the creditors and the court before the court can sanction the scheme (*Re Halley's Departmental Store Pte Ltd* [1996] 2 SLR 70);

(b) the explanatory statement should provide 'all the information reasonably necessary to enable the recipients to determine how to vote' (*In re Dorman, Long & Company Ltd* [1934] Ch 635);

(c) if a fact would tend to influence a sensible creditor's decision on whether the proposed scheme is in his interest or not, then it is 'material' for the purpose of the approval (*Phosphate Co-operative Co of Aust Ltd v Shears & Anor (No 3)* [1989] VR 665); and

(d) the information required to be disclosed are 'information which a creditor bear upon his chances of obtaining a better deal than the one being offered under the Proposed Scheme'. The creditors should have

sufficient information to make a sensible commercial judgment in his own interest whether to approve the proposed scheme or otherwise.

**[120]** In the Supreme Court of Western Australia decision of *Re Wesfarmers Ltd; Ex parte Wesfarmers Ltd* [2018] WASC 308 ('Re Westfarmers') the Supreme Court set out some guiding principles on the standard of disclosure required at [53] to [58]. In summary, the principles are as follows:

(a) the emphasis is on ensuring proper disclosure so that the members are properly informed in their consideration of the proposed scheme (*Re NRMA Insurance Ltd (No 1)* [2000] NSWSC 82 ('Re NRMA') at [30];

(b) what is required is a statement of all the main facts that will enable shareholders to exercise their judgment on the proposed scheme (*Re NRMA* at [16]);

(c) the court is also concerned with the notion of a fair picture being presented. In a scheme which involves difficult questions of commercial judgment and matters of degree and conjecture as to future prospects, there is room for a range of opinion (*Re Crusader Ltd* [1996] 1 Qd R 117) ('Re Crusader' ) at pp 125–126;

(d) the court must be satisfied, at least to a prima facie level, that there has been proper disclosure with nothing misleading or deceptive in any material sense (*Re NRMA* at [3]); and

(e) the court highlighted that in each case, the extent of disclosure required is a question of fact and degree dependent on the nature of the scheme and the context in which it is advanced for consideration. The disclosure must be considered in a practical and commercially realistic way, having regard to the complexity of the proposed scheme.

**[121]** The court also remarked that in a large or complex proposed scheme of arrangement, there ought to be a balance. The need to make full and fair disclosure must be qualified by the need to present an intelligible document which is likely to assist, rather than to confuse. In complex cases, it may be necessary to be selective in the information provided and confine it to facts that are realistically useful (see: para [56] of *Re Wesfarmers* citing p 556 of *Fraser v NMRA Holdings Ltd* (1995) 55 FCR 452):

> [56] In any large or complex proposed scheme of arrangement there is a balance to be struck. An insufficiency of information may mean that members are not properly informed. Too much information may mean that the disclosure is unintelligible or incomprehensible. While made in a different context, the following observations are apposite:
>
> If every possible formulation of the commercial objective of the proposal, and arguments for and against every theoretical possibility, were set forth the total

package of information to members would be likely to confuse rather than to illuminate the issue for decision, even for people having a familiarity with corporate law and commerce. *The need to make full and fair disclosure must be tempered by the need to present a document that is intelligible to reasonable members of the class to whom it is directed, and is likely to assist rather than to confuse. In complex cases it may be necessary to be selective in the information provided, confining it to that which is realistically useful.* (citations omitted) (Emphasis added.)

**[122]** In *Premier Oil Plc*, the judge held that in assessing the adequacy of an explanatory statement, the amount of information provided should commensurate the complexity of the scheme. It is recognised that in schemes with great complexity, the explanatory statement does not need to state all relevant facts.

**[123]** What is important is whether the explanatory statement had sufficient information for the scheme creditors to make a reasonable judgment on whether the proposed scheme is in their commercial interests. In other words, 'have the majority of the Scheme Creditors (who have approved the Schemes in their respective Scheme Meetings) done so under some serious misapprehension of the risks and rewards of the Schemes?' (see paras [130]–[132] of the judgment.)

**[124]** Hence, while the contents of the explanatory statement should generally be clear, complete, and not misleading, the court has recognised that perfection is hardly attainable. It should be accepted that it is often possible to criticise the manner in which disclosure is made. However, as a matter of commercial reality, what is crucial is that the terms of the explanatory statement suffice to enable the members to exercise a commercial judgment on a fully and properly informed basis.

**[125]** Pursuant to s 369 of the CA 2016, the applicants have issued ES to their respective scheme creditors to explain the effect of the respective schemes and to state any material interests of directors, and the effect of the respective schemes so far as it is different from the effect on the similar interests of other persons.

**[126]** The ES were drawn up with the assistance of the independent financial advisors, EY. The earlier drafts of the ES during the convening stage were heavily challenged and criticised by Seng Long in earlier affidavits and submissions. The applicants and EY then made modifications and improvements to the ES for it to be finally issued.

**[127]** To my mind, the applicants have disclosed sufficient information that is reasonably necessary to enable the unsecured scheme creditors to make a

reasonable judgment on whether the respective schemes are in their commercial interests and for them to vote on the schemes. There has been proper disclosure with nothing misleading or deceptive in any material sense.

**[128]** More specifically, on the allegation pertaining to the exclusion of 'Project Creditors' in Appendix H of the ES, the applicants have explained in the ES that these creditors are excluded because they are creditors of ongoing projects in the ordinary course of business. The applicants have also explained the reason behind this exclusion by way of letter to the relevant creditor(s). There is no evidence that any of the unsecured scheme creditors falls within this category of 'Project Creditors' at all. In any case, it is the prerogatives of the applicants to determine the creditors coming under their respective schemes of arrangement.

**[129]** A company is free to select the group of creditors whom it wishes to enter into a scheme of arrangement with, as held in the Federal Court decision of *Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & Ors and other appeals* [2014] 6 MLJ 56 ('Dataran Mantin').

**[130]** In *Dataran Mantin*, the scheme company had proposed a scheme of arrangement with certain creditors under a specific project. All the other secured and unsecured creditors of the scheme company were excluded from the scheme.

**[131]** The questions of law before the Federal Court were, among others, 'whether s 176 of the Companies Act 1965 can confer preference on one group of creditors whilst excluding another group altogether where the company is wound up or is in the process of being wound up' and 'who in law would constitute a class of creditors within the meaning of s 176 of the Companies Act 1965'.

**[132]** The Federal Court referred to authorities such as the English Court of Appeal decision of *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 and the Malaysian High Court decision of *Jin Lin Wood Industries Sdn Bhd and others v Mulpha International Bhd* [2005] MLJU 326; [2005] 7 CLJ 208 agreed that there can be a scheme of arrangement for one distinct class of creditors. The scheme creditor is entitled to not compromise with all of its creditors, and the mere exclusion of a creditor does not give rise to the imputation of mala fide or abuse of process. See [46]–[51] of the judgment:

> [46] In the case of *Re Hawk Insurance Co Ltd* at pp 510 to 512 the English Court of Appeal, in construing s 425 of the English Companies Act 1985 (which is similar to our s 176(1)), recognised that there can be a scheme of arrangement for one distinct class of creditors having regard to the plain meaning of the words in the section. In that case, Chadwick LJ set out 3 different cases under which a scheme could be

formulated pursuant to s 425 of the Companies Act 1985:

...

[47] In a local case of *Jin Lin Wood Industries Sdn Bhd and others v Mulpha International Bhd* [2005] MLJU 326; [2005] 7 CLJ 208 at p 212 the High Court, inter alia, said:

> ... *The mere exclusion of a certain creditor does not open the applicants to imputations of mala fides and abuse of process. Under s 176(1), the applicants have the discretion not to compromise with all creditors and the rights of the remaining creditors are merely stayed* ... (Emphasis added.)

**[133]** This freedom of choice was also endorsed by the English High Court decision of *Re Bluebrook Ltd and other companies* [2009] EWHC 2114 (Ch). The court held at [24] that a company is free to select the creditors with whom it wishes to enter into an arrangement and need not include creditors whose rights are not altered by the scheme, citing the English Court of Appeal decision in *Sea Assets Limited v Perusahaan Perseroan (Persero) Pt Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 ('Garuda').

**[134]** In *Garuda*, the scheme company excluded the trade creditors and the procurement contract creditors from a scheme of arrangement. An opposing creditor then argued that that a class of creditors cannot be constituted by a process of arbitrary selection by the company, and where a class is formed, all creditors falling within that class must be included in the scheme.

**[135]** The High Court judge accepted that while a company should not choose scheme creditors in an arbitrary way, the company is free to select the particular group of creditors with whom it wishes to in a scheme of arrangement. The judge took note that the scheme company was still trading with a wide variety of creditors and also the company's explanation that while it was possible to deal with certain creditors by agreement, it was not practical to do so with the scheme creditors. The judge also commented that *Garuda* was 'adopting a commercially rational approach in leaving the trade creditors and the procurement contract creditors to be dealt with outside the financial restructuring altogether and in using the statutory procedure limited to those creditors in respect of whom it was sensible and appropriate that it should be used' (see [23] of the judgment).

**[136]** On appeal, the Court of Appeal endorsed the High Court judge's approach and held that commercial realities and logic allow for the scheme company to exclude certain creditors. It may be necessary for the scheme company to exclude creditors which insist on full payment to continue to supply to the company and thereby enabling the company to continue trading. See [45] and [46] of the judgment:

A [45] ... Mr Cohen's complaint appears to be primarily that the trade creditors and the procurement contract creditors are outside the scheme and are not to be treated like the scheme creditors under the scheme. *But to suggest that those who in the real world would not accept less than the due payment of 100% of their debt in order to continue supplying the company (and thereby to enable the company to continue trading)* B *must be included in the scheme as scheme creditors, defies not only commercial logic but would defeat the legislative purpose of s 425 to facilitate compromises and arrangements* ...

[46] Mr Cohen suggested that to leave the company to select the members of the class of creditors to be brought within the scheme would enable the company to C pick a class such as would outvote a recalcitrant creditor. *But such an example to my mind ignores the commercial realities. No company proposing a scheme will want to leave out of the scheme creditors other than those with whom they have reached agreement or those with whom agreement is impossible but who have to be paid in full if the company is to survive. Nor will it want to put forward a scheme with an arbitrary* D *selection of creditors to be bound by it when it has to procure not only the approval of 75% of the scheme creditors subject to the scheme but also the sanction of the court.* (Emphasis added.)

E **[137]** As regards the complaint that details and calculations of the Intercompany and related company creditors' debts filed in support of this Application are inconsistent with the sums stated in the list of creditors attached to the ES and the financial records, the applicants have replied to SESB by way of letter and stated that the intercompany creditors had filed their respective PODs with the necessary ledgers to support their claims. The figures F matched the existing books and records of IJSB.

**[138]** In any case, it is not a precondition for the applicants to satisfy each creditor of the extent of its debts and liabilities owed by the applicants to other G creditors unless the opposing creditors have shown some prima facie impropriety in the admission of these debts (see: *TT International*).

**[139]** On the allegation of insufficient disclosure regarding details and quantum of funding by the White Knight and the fund-raising exercises, the H applicants have explained that they cannot finalise the exact quantum of funding as the amount is dependent on the adjudication of the unsecured scheme creditors' claims (10% cash repayment). However, the applicants have continued to update the creditors on the White Knight's commitments to the schemes. Subscription to shares by the White Knight via private placement I exercise has been disclosed. Suffice it to state that the unsecured scheme creditors have been informed of the steps taken by the White Knight to demonstrate its commitments to the schemes of arrangement, the sufficiency or otherwise of which is for the unsecured scheme creditors to decide and not the court.

**[140]** As regards, the complaint that the list of material litigation against the applicants was not included in the ES, it is not a legal requirement to include the list of material litigation in the ES. It does not assist in explaining the details and effect of the schemes of arrangement. In any case, all material litigations (save for those where leave to continue had been given) would be compromised and or extinguished by the schemes of arrangement upon the sanction by this sourt. It is also not material information that will influence the creditors on how to vote on the schemes, particularly where a restraining order has been in place since 31 December 2020.

**[141]** Some of the opposing scheme creditors have challenged the legitimacy of Sykt Logam Unitrade and Ilham Metro as creditors under the schemes.

**[142]** In relation to Sykt Logam, Edwincom and Persflor raised the issue of a consent judgment dated 24 June 2020 entered between TBCB and IJSB vide Civil Suit No BA-22NCvC-378–09 of 2019 at Shah Alam High Court ('consent judgment dated 24 June 2020') where a total of 12 units of Damai 88 service apartments were to be contra to Sykt Logam.

**[143]** Edwincom further alleged that there was double recording of the total adjudicated debt under IJSB scheme and TBCB Scheme and that the adjudicated debts were 'ridiculous' if the 12 contra units to Sykt Logam have been completed.

**[144]** Again, I find no merits to these objections. The consent judgment dated 24 June 2020 was entered into before the commencement of the scheme of arrangement proceedings. More importantly, it has not been shown that there has been any disposal of assets of IJSB to Sykt Logam, as alleged by Edwincom. This is the reason why Sykt Logam has chosen to participate in the IJSB scheme as a scheme creditor and filed its POD for the full debt amount owing under the consent judgment. Further, there is no evidence any double recording of Sykt Logam's debt. The terms of the consent judgment dated 24 June 2020 are for IJSB and TBCB to pay the sum of RM24,539,356.92.

**[145]** According to the Federal Court decision of *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253, the court held that the liability of two or more judgment debtors under a judgment is both joint and several by operation of law under s 44(1) of the Contracts Act 1950. The effect of s 44(1) of the Contracts Act 1950 is that unless a contrary intention is expressed in the contract, all joint contracts effectively impose a full liability for the debt on each of the promisors.

**[146]** So long as a judgment debt remains unrealised, the judgment creditor is entitled to proceed against one or any number of judgment debtors to secure

A the performance of an obligation in its entirety.

**[147]** Therefore, the applicants have correctly recorded the full amount of RM24,539,356.92, being the total judgment sum borne jointly and severally by IJSB and TBSB under the consent judgment dated 24 June 2020, in both the IJSB scheme as well as the TBCB Scheme. There is no double recording or inflation of Sykt Logam's debt as alleged.

**[148]** In relation to Ilham Metro, Edwincom alleged that the adjudicated sum of Ilham Metro 'is believed to have been satisfied by the applicants' to Ilham Metro. Edwincom sought to justify this allegation due to the filing of a Notice of Discontinuance with no liberty to file afresh by Ilham Metro in the court matters against TBCB and IJSB.

**[149]** Edwincom's aforesaid allegation, however, was made based on bare accusations and assumptions about the notice of discontinuance filed. There has been no undue payment given to Ilham Metro as alleged. There is no evidence that Ilham Metro had been paid previously. Ilham Metro has chosen to participate in the IJSB scheme as a legitimate creditor with its full claim of debt.

**[150]** As regards the complaint that the financial records submitted in support of this Application do not reflect the value of the intercompany creditors and or the related company creditors' debts as stated in the list of creditors in the ES and also that the audited financial statements of the applicants have not been finalised, some useful guidance can be gleaned from the English High Court decision of *Re Sunbird Business Services Ltd* [2020] EWHC 3459 (Ch) ('Re Sunbird') where it was held at [96] that the test was 'whether any defects that have been shown to exist in the scheme documentation would be likely to have made any difference to the particular scheme creditors affected by the scheme'. In other words, whether the omitted information would have changed any of the creditors' views on the merits of the scheme.

**[151]** In *Re Sunbird*, the opposing creditors had questioned, among others, certain inaccuracies in the company's financial information and insolvency analysis (see [50]–[70] of the judgment). For example, regarding the amount of trade receivables and current liabilities of the company, there was no further explanation of why certain items were included in the balance sheet as liabilities but described in the note as assets.

**[152]** Although the court agreed that the errors collectively rendered the financial information provided to the scheme creditors unsatisfactory, the court was satisfied that that information would not have changed the view of

creditors on the merits of the scheme and proceeded to sanction the scheme. A

**[153]** The court further remarked that there is *no absolute requirement that the financial information provided to scheme creditors must be audited.* Each case will turn on its own facts, as long as the scheme creditors are drawn to the limitations in the financial information: B

> 94. In that regard, the new Practice Statement explicitly recognises that explanatory statements 'should be in a form and style appropriate to the circumstances of the case, including the nature of the member and/or creditor constituency, and should be as concise as the circumstances admit'. It is also necessary to recognise that perfection is not always attainable. C
>
> 95. *For similar reasons, it cannot be an absolute requirement of sanction that the financial information provided to scheme creditors must always have been audited or to have been subject to a full independent review. Each case will turn on its own facts and, as the Practice Statement indicates, on the nature of the creditor constituency.* Where scheme creditors are sophisticated, provided that their attention is fairly drawn to the limitations in the financial information and the scope of any review of it by a third party, those creditors may well be able to form their own view on whether what they have been given is adequate. D
>
> 96. At the end of the day, *the question for the court must be whether any defects that have been shown to exist in the scheme documentation would be likely to have made any difference to the particular scheme creditors affected by the scheme.* (Emphasis added.) E

**[154]** In light of the allegations of insufficient disclosure, this court has taken into account that the applicants are going through a complex restructuring exercise involving three companies, and having to carry out capital market exercises to support the restructuring. There is a need for the applicants to be selective in the information presented in the ES and to confine it to facts that are necessarily useful for the unsecured scheme creditors to arrive at a commercial judgment on the schemes. F G

**[155]** Notwithstanding the complaints raised on the inconsistencies between the financial records and the value of the intercompany and or related company debts as listed in the list of creditors in the ES, SESB has not demonstrated that any of the creditors who had voted on the schemes was under 'any serious misapprehension of the risks and rewards' (see: *Premier Oil Plc* at [132]). H

**[156]** I agree with learned counsel for the applicants' submission that the applicants have indeed made sufficient disclosure in the ES, with nothing misleading or deceptive in any material sense. As a matter of commercial reality, what is crucial is that the terms of the ES were sufficient for the unsecured scheme creditors to exercise their commercial judgment on the proposed schemes (see: *Re Wesfarmers* at [58]). I

*Opposing scheme creditors' objections against the virtual meeting*

**[157]** Edwincom contended that the applicants' appointed service provider had prevented them from attending the virtual meeting and thus depriving Edwincom's right to attend and vote. Further, Edwincom was aggrieved that the applicants had summarily dismissed its' complaints.

**[158]** The meeting was fixed at 10am and Edwincom had attempted to login via the link provided before the scheduled time. When unable to do so, it immediately notified the service provider for IJSB via email ie at 9.54am and also attempted to call them but all calls went unanswered.

**[159]** Edwincom only received a reply three days after the meeting, ie on 29 August 2021 at 7.14pm informing that due to a technical glitch during its' registration, the registration which was previously approved has changed status to 'reject', thus the link provided to attend the Meeting was cancelled.

**[160]** Edwincom through its solicitors recorded their complaint and the applicants vide their solicitors' letter dated 2 September 2021 replied and confirmed that Edwincom was prevented from attending and/or vote at the meeting. Edwincom was informed of the voting results and of the applicants' intent to proceed with the application for court sanction forthwith.

**[161]** Premised on the aforesaid, Edwincom contended that there was a breach of procedural fairness in the applicants' conduct of the meeting and that it had been treated unfairly, with the applicants disregarding the requirements of natural justice and making decision to ignore its' complaints in a procedurally unfair manner.

**[162]** Learned counsel for Edwincom urged the court to note the applicants' conduct and see whether their conduct, though may be within the four corners of the rules governing creditors' meeting properly interpreted, could nonetheless be described as mala fide. Creditors' meeting should be accorded appropriate requirements of natural justice and fairness ensured to all creditors.

**[163]** Learned counsel for SESB on the other hand raised his discontent with the virtual meeting contending that the said meeting failed to meet the legal requirement of a 'meeting'.

**[164]** More specifically, it is submitted that the 'Administrative Guide For The Fully Virtual Court Convened Meeting' and in particular the manner in which questions were posed at the Scheme Creditors' Meeting on 26 August 2021 did not provide a proper procedure for a 'live audio and video' platform

for questions to be taken at the meeting. Questions can only be posed by 'text' and there was no fluency in the exchanges between the scheme chairman and the questioners. It is said that the manner in which the meeting was conducted was not conducive for proper debates on key issues pertaining to the legitimacy of the IJSB scheme.

**[165]** Further, it was contended that the scheme creditors' meetings had proceeded on 26 August 2021 with all three meetings of the scheme creditors' meetings being 'bulldozed' through the same day without affording the scheme creditors a proper forum for oral questions to be posed. The applicants for reasons best known to them chose to use the services of a relatively unknown company to conduct the virtual meeting. The 'Dvote System' used by the company engaged by the applicants did not provide a conducive forum for proper debates on key issues. This is despite the fact of the availability of many established platforms which provide avenues to conduct a proper 'virtual meeting'. It was contended that the applicants were only able to successfully secure the requisite votes because of the limitations in the use of this 'Dvote System' to conduct the scheme creditors' meetings.

*Court's deliberation*

**[166]** At the outset, it must be stated that the scheme meetings were held during the onset of the Covid-19 pandemic which was unprecedented in this country and the world. Physical meetings were not possible and the holding of the virtual scheme meetings were to adhere to the Full Movement Control Orders and the relevant standard operating procedures in place at the time.

**[167]** Whilst virtual meetings could never replicate physical meetings, it is still necessary that such virtual meetings contain all the necessary features that one would expect from conducting physical meetings. These features would include easy access to register and attend the meeting, ability for participants of the meeting to express their views and ask questions, the broadcasting of the answers to the questions asked to all the participants, the ability for the questioners and or other participants to ask follow up questions, the possibility for the participants to hold private discussions among themselves and a simple mechanism for expressing their votes to the matters discussed.

**[168]** In the present case, having the scheme meetings via the virtual platform had enabled such meetings to proceed notwithstanding the Covid-19 pandemic. The virtual meetings had secured a high turnout of scheme creditors and allowed the scheme meetings to proceed in a safe manner.

**[169]** In relation to Seng Long's allegation that the scheme chairman, EY and the applicants' legal counsel not answering all of the questions raised by the

A unsecured scheme creditors, I note from the minutes of the IJSB scheme meeting that most of the list of 13 questions submitted by Seng Long were raised and answered at the scheme meeting itself.

B **[170]** In addition, the applicants had followed up by way of a written reply to Seng Long to address those 13 questions. Seng Long is not prejudiced by the unanswered questions during the scheme meeting because each of those 13 questions have also been responded by way of letter and affidavit. Seng Long was also given the opportunity to ask follow-up questions to the answers given.

C **[171]** Whilst the applicants do acknowledge that not all the questions could be taken and answered by the scheme chairman at the meetings, and this was one of the grievances raised by Seng Long, nevertheless, I am satisfied with the explanation by the applicants that due to the sheer number of questions, the applicants had to be selective in answering the questions within the limited timeframe to be fair to each scheme creditor.

D

**[172]** It has not been demonstrated to this court that there were any critical questions which were deliberately ignored by the scheme chairman and or which if the scheme chairman had not disallowed the same would have cast a different perspective to the schemes of arrangement that would impact the manner in which the votes would have turned out.

E

**[173]** As regards Edwincom's complaint that the scheme meeting was irregular because it was 'unable to raise any objections or to voice Edwincom's dissatisfaction against the validity of the scheme of arrangement and/or to cast vote' arising from Edwincom's failure to login and vote during the scheme meeting, the applicants' solicitors had written to Edwincom and explained that there had been a technical error during the scheme meeting and that due to certain network issues, the Dvote's system had re-run the process inadvertently which had caused their system to reject Edwincom's proxy's attempt to login.

F

G

**[174]** While the applicants regret this unfortunate incident, the applicants had highlighted that Edwincom was not intentionally prevented from logging on and to vote on the IJSB scheme. Furthermore, Edwincom was the only scheme creditor out of 99 scheme creditors who had experienced such a technical issue and was unable to vote on the IJSB scheme.

H

**[175]** Furthermore, in light of Edwincom's value of claim (0.05% of the scheme debts), its vote against the IJSB scheme would not have affected the value of debts voting in favour in a material manner. In any event, the applicants have continued to recognise that Edwincom holds the adjudicated debt amount and Edwincom's claim would continue to be part of IJSB's Scheme if sanctioned by this court.

I

**[176]** SESB complained that the scheme chairman could have allotted a longer time for discussions and questions before proceeding to call for the votes instead of bull-dozing through the meeting. Whilst it could have been said on hindsight that a longer time ought to have been allotted for the IJSB scheme meeting, nevertheless, there is no evidence before the court that the outcome of the meeting would have been any different even if the scheme chairman had extended the duration of the meeting.

**[177]** Both SESB and Persflor had alleged that the scheme meeting did not provide 'a proper procedure for a live audio and video platform for questions to be taken' and that 'questions can only be posed by text'.

**[178]** With regards to the aforesaid, there are indeed certain features of the virtual meeting that merit some comments. Unlike a physical meeting, questions that were posed had to be typed up and when answers were given to the questions, there was a lack of facility for an immediate follow up to the answers. This is because the proceedings were not conducted via the normal video platforms where parties are able to engage with each other as in the case of a virtual meeting via the zoom platform, for example. There is therefore a lack of fluency in the exchange. In addition, there was also no facility for participants to engage with one another during the meeting by way of 'breakout rooms'. It is said that this 'defect' had resulted in the participants not being able to come together to discuss among themselves before casting their votes, hence, defeating the very notion of a 'meeting'.

**[179]** I must confess that I had initially entertained some concerns over the efficacy of the virtual meetings given the shortcomings highlighted by learned counsel for SESB. However, I am mindful of the fact that the available platforms for conducting a virtual meeting of the kind that is envisaged for the scheme meetings may be limited as such meetings are of recent origin. Unlike the zoom platform, there is a need for a 'bespoke' platform that can permit for the registration and verification of the attendees and the casting and computation of the different votes cast by the attendees.

**[180]** Learned counsel for the fourth respondent has not adduced any evidence of any better and alternative platforms to the 'DVote System' that was used by the applicants in the present case.

**[181]** More importantly, it has not been shown to the court that the lack of fluency in the virtual scheme meeting and or absence of the 'breakout rooms' had led to the unsecured creditors not being able to appreciate the IJSB scheme. Further, through answers that were read out by the scheme chairman to the questions posed, all the participants were made aware of the concerns expressed by their fellow creditors regarding the IJSB scheme and had presumably taken

those concerns on board in their own evaluation of the IJSB scheme.

**[182]** Hence, this court is satisfied that the creditors were already fully aware of the details and effect of the schemes and the consequences of the schemes if approved. The disadvantages raised regarding the conduct of the meeting in this case were not such that would compel this court to withhold the sanction of schemes.

**[183]** In *Sentoria*, an intervener raised some allegations in relation to the conduct of the meeting. The issues were for example, creditors could only type 800 characters per question, questions and answers were done individually and not displayed for all creditors to see, or that there was insufficient time. Nonetheless, after perusing the evidence such as minutes of the meeting and the affidavits on the issues, the court held that those issues were trivial, and the intervener's complaints were of no merit. All creditors were fully aware of the details and effect of the proposed scheme and the consequences of the scheme if approved. This was what the learned judge said at [97] of the judgment:

> [97] On the issues of improper conduct of the meeting, the first intervener has raised some allegations. No other creditors have raised any issue on the conduct of the meeting. *These issues are in my view quite trivial such as creditors could only type 800 characters per question and that questions and answers were done individually and not displayed for all creditors to see or that there was insufficient time. However, bearing in mind that this was uniquely a meeting held virtually, and with some lawyers attending as proxies for the creditors (as submitted by counsel for the interveners) and after perusing the minutes of such meeting as well as the affidavits on this issue, I see no merit in the complaints. In my view, all creditors were fully aware of the details and effect of the proposed scheme and the consequences if the same were approved.* (Emphasis added.)

**[184]** Accordingly, I hold that the manner in which the virtual scheme meeting was held did meet the requirement of a 'meeting' and the disadvantages were not such that there were no effective deliberation and discussion of the issues amongst the participants.

*Extension of POD submissions*

**[185]** As set out in the above background facts, there were three tranches for the POD submissions.

(a) Tranche 1: First and second POD exercise — up to 9 July 2021;

(b) Tranche 2: PODs submitted after 9 July 2021 but before the IJSB scheme meeting; and

(c) Tranche 3: PODs submitted and adjudicated after the IJSB scheme meeting.

**[186]** Seng Long has objected to the scheme chairman's decision to extend the POD submission deadline for Tranche 2 and his decision to admit the late PODs submitted.

**[187]** In reply, the scheme chairman stated that he has exercised his discretion to fairly extend the POD submission deadline and to adjudicate on the late PODs for the benefit of all the unsecured scheme creditors. If the PODs were not admitted and adjudicated on by the scheme chairman, the claims of those relevant scheme creditors will be completely extinguished if this Court sanctions the IJSB scheme. The relevant scheme creditors would receive zero distribution under the scheme.

**[188]** The applicants similarly did not object to the extension of POD submission deadline as it wishes to ensure as fair as a treatment to all the scheme creditors. This is despite the fact that the applicants would have to pay out more distribution under the sanctioned scheme to more scheme creditors.

**[189]** In *TT International*, the court remarked at [66] that if the scheme chairman wishes to extend the time for submission of proofs, prior court sanction should be sought, and all creditors should also be informed to ensure that the extension of time benefits all and not just a particular group of creditors. However, the court did not cite any legal authority as to why prior court sanction should be sought. This is especially with the time-sensitive nature of the scheme proceedings and for the holding of the scheme meetings. It would not have been practical to delay the scheme meetings while waiting for a prior order to allow for the Tranche 2 and Tranche 3 PODs.

**[190]** In the Singapore Court of Appeal decision of *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGCA 18, the Court of Appeal held that the court had jurisdiction to extend the time for a creditor to file its proof of debt even post the sanction of a scheme. The court held that the overriding consideration was the prejudice to the company, the other parties to the scheme as well as the party seeking the extension of time.

**[191]** Therefore, it is my judgment that this court does indeed have the discretion to extend the admission of the PODs during the sanction hearing. To my mind, the scheme chairman has acted in good faith by trying to ensure that the relevant scheme creditors with legitimate claims against the applicants would not be substantially prejudiced by submitting their PODs late and I see no prejudice to any of the unsecured creditors for allowing the extensions.

**[192]** Some of the opposing scheme creditors have raised the issue of the inspection of the PODs of other unsecured scheme creditors. Before I proceed to deliberate on this issue, it is helpful to appreciate the adjudication

mechanism in the present scheme of arrangement.

**[193]** The applicant's scheme of arrangement has built a mechanism for the adjudication of the PODs of unsecured scheme creditors who dispute the sums admitted by the scheme chairman.

**[194]** The scheme chairman would carry out the initial adjudication of the debts: with the assistance of the financial advisors, EY, and also with the assistance of a quantity surveyor.

**[195]** There is no evidence adduced to show that the scheme chairman's adjudication of the debts was not carried out fairly. So, for example, even in the hotly contested IJSB scheme: Ikhmas Jaya Holdings Sdn Bhd's original POD was for the sum of RM15,410,828.97. This scheme chairman in the end adjudicated the figure for the sum of 13,973,328.97.

**[196]** As a second tier of adjudication, an independent assessor, Rodgers Reidy & Co, ('RR' or the 'independent assessor') was also appointed. The adjudication process was as follows:

> 9.7 As soon as reasonably practicable and at least twenty-one (21) days before the Court Convened Meeting, the Scheme Chairman shall:
>
> (a) Complete the adjudication of all PODs; and
>
> (b) Send in writing the results of the adjudication of the PODs to every Unsecured Scheme Creditor who has filed a POD. The results of the adjudication shall state the name of the Unsecured Scheme Creditor who has filed the POD, the amount claimed under the POD, the amount (if any) of the POD admitted, and the amount (if any) rejected by the Scheme Chairman.
>
> 9.8 Any dispute by an Unsecured Scheme Creditor or TBCB on the adjudicated value of the POD carried out by the Scheme Chairman shall be determined in accordance with the following provisions:
>
> 9.8.1 The Unsecured Scheme Creditor or TBCB (as the case may be) shall give written notice ('Dispute Notice') to the Scheme Chairman within eight (8) days from the date of the Scheme Chairman's letter notifying the decision or determination to that Unsecured Scheme Creditor or TBCB (as the case may be) ('Dispute Period'). Any Unsecured Scheme Creditor that fails to do so, or TBCB if it fails to do so, within the Dispute Period shall be deemed to have admitted and accepted the decision or determination of the Scheme Chairman regarding the adjudication of the POD for the value of the debt owing to the Unsecured Scheme Creditor.
>
> 9.8.2 The Dispute Notice issued by an Unsecured Scheme Creditor or TBCB (as the case may be) shall include a written request for the independent assessor, RR ('Independent Assessor'), to decide on the dispute in relation to the adjudicated

value of the POD by the Scheme Chairman. The Scheme Chairman shall as soon as practicable provide the relevant POD and any other information relied upon by the Scheme Chairman in his adjudication of the POD to the Independent Assessor.

9.8.3 The Independent Assessor shall not later than seven (7) days (or such date as reasonably required) after being provided with the relevant POD and information above:

(a) Decide on the dispute on the adjudication of the POD to determine the value of debts owing to the Unsecured Scheme Creditors; and

(b) Send a written notice of the decision to the Scheme Chairman, TBCB and any Unsecured Scheme Creditor who is a party to this dispute.

9.8.4 The time-cost remuneration of the Independent Assessor in carrying out this independent assessor role for the Dispute Notice shall be borne by the requesting party. As set out above, the initial retainer fee of the Independent Assessor would already be borne by TBCB.

9.9 In the event the Unsecured Scheme Creditor or TBCB (as the case may be) is unsatisfied with the decision of the Independent Assessor, *that party may make any necessary application to the High Court of Malaya* and that party shall bear their own costs and expenses in relation to or arising from such application. (Emphasis added.)

**[197]** Notably, none of the opposing creditors have made a formal application to this court to dispute the decision of the independent assessor.

**[198]** The law in relation to the adjudication of PODs affords discretion to the decision of the scheme chairman or decision maker in a scheme of arrangement. However, as envisaged in the applicants' adjudication process above, the creditors ultimately can still appeal against the decision maker's adjudication decision.

**[199]** In *Re Top Builders*, I had explained the scheme chairman's role in the adjudication of POD process in the following manner:

[72] In practice, *the determination of these claims made in the form of proofs of debt submitted to the company is by the chairman of the creditors' meetings or an appointed scheme manager ('the decision maker')*. The decision maker is not an officer of the court in the same way that a liquidator of a company under a winding up order is. Nevertheless, it has been held that the decision maker owes a fiduciary duty to act in good faith and with complete impartiality and assumed a quasi-judicial role when adjudicating the proofs of debt (see *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] SGCA 9).

[73] *The powers of the decision maker is exercised in a summary manner based on information and documents of the company and that which the person claiming to be creditor chooses to put before the decision maker, who is entitled to request for further*

*proof, if he deems fit.* The decision is typically undertaken just a few days before the creditors' meetings or just prior to the start of the creditors' meetings without any lengthy and detailed evaluation to meet the date line for the creditors' meetings. In some cases, the decision maker may have the benefit of legal advice on the claims.

[74] *In the process of evaluating the claims, the decision maker may have to make fair estimates of certain claims and if there is little or insufficient materials to form a conclusion as to a value, to ascribe a nil or minimal amount to the claims. Where there is a dispute, the decision maker may either reject the claims or permit the claims, whether in whole or in part.* In cases where the claims are contingent claims or unliquidated claims or where the company is seeking a set off or counterclaim, a fair estimate or value will have to be made. In arriving at the determination of the claims in such cases, there will be some exercise of discretion (see *Re UDL Holdings Ltd & Ors* [2000] 4 HKC 778).

...

[95] Based on the aforesaid outline of the scheme of arrangement process, it is clear that Parliament has intended by s 368(1) of the CA for the scheme of arrangement proceedings to serve as the preferred alternative platform for the determination and resolution of the claims by the creditors against the company which, if the scheme is to have any chance of succeeding, must take precedence over the normal legal proceedings filed in court or before an arbitral tribunal. *The adjudication of the creditors' claims under the scheme of arrangement is in a summary fashion as opposed to the normal legal proceedings where elaborate investigation into the evidence is conducted for establishing the merits of the claims.* (Emphasis added.)

**[200]** In *TT International*, a similar sentiment was expressed by the Singapore Court of Appeal:

[107] *Further, when deciding which proportion of a creditor's claim to admit (or to allow a creditor to vote, when his proof is marked as objected to), the chairman need only make a 'reasonable estimate'* (see Ian Fletcher, John Higham QC and William Trower QC, *Corporate Administrations and Rescue Procedures* (LexisNexis, 2nd Ed, 2004) at para 13.20) *or, put another way, a 'justestimate ' of the claim in question by do ing his best with the factual material the claimant furnishes, without undertaking any detailed inquiry* (see reg 5.6.23(2) of the Corporations Regulations 2001 (Cth) and *Selim v McGrath* ([101] supra) at [103], endorsed in *Bacnet* ([101] supra) at [77]; note also that in the local context of a liquidation, a 'just estimate' must be made, so far as possible, of unascertained claims: see s 327(1) of the Act). If it is impossible to ascribe any sensible value to a claim, the chairman should attribute a nil value to it and the claim should be rejected (see *Re UDL Holdings Ltd* [2001] 1 HKLRD 156 at 165J–166C, cited with approval in Bacnet at [88]).

[108] We should emphasise that up to now, we have only been discussing the position regarding the chairman's admission or rejection of claims for the purpose of voting in a s 210 creditors' meeting. *It must be made clear that even though the court may order (on appeal by a creditor) that his claim be admitted or rejected for the purpose of voting, this is in the nature of a 'rough and ready' determination keeping in mind that a vote on the proposed scheme should not be delayed unnecessarily. Such an order does not*

*bar the creditor from going back to the court subsequently to seek determinative final adjudication of the same claim on its merits.* (Emphasis added.)

**[201]** The applicants in the present schemes of arrangement have allowed for a further mechanism of appeal. unsecured scheme creditors, unsatisfied with the adjudication results, were allowed to appeal to the independent assessor.

**[202]** Therefore, the adjudication of the PODs by the scheme chairman and the decision-making process involved was carried out as per accepted scheme law. Further, through the use of an independent assessor, the applicants' have surpassed this requirement. The applicants have provided the unsecured scheme creditors an opportunity to appeal against the scheme chairman's decision before the scheme meetings were held.

**[203]** Having explained the mechanism of adjudication of the PODs above, I will now deal with the complaint by some of the unsecured scheme creditors that they were not able to inspect the PODs of other unsecured scheme creditors.

**[204]** More specifically, Seng Long has alleged that IJSB's ES did not provide 'the procedures with respect to the inspection of other unsecured scheme creditors' PODF'. Seng Long alleged that the unsecured scheme creditors should be provided the opportunity to inspect and scrutinise the PODs submitted by the directors and major shareholders of IJSB, including TBCB and IESB. However, Seng Long has never formally written to the applicants to request inspection any of the PODs of the unsecured scheme creditors.

**[205]** Further, on 23 August 2021 (just three days before the scheme meeting), SESB wrote to the applicants to, among others, request for copies of the PODs and supporting documents of certain intercompany creditors and/or related party creditors.

**[206]** On 25 August 2021, the applicants replied to SESB by way of letter and stated that the intercompany creditors had filed their respective PODs with the necessary ledgers to support their claims. The figures matched the existing books and records of IJSB. IJSB was unable to provide the PODs and supporting documents as requested.

**[207]** Therefore, SESB's complaint is that 'the applicants have refused to give supporting documents of these creditors when requested despite the fact that Scheme Creditors are entitled to examine the Proof of Debts submitted by other Scheme Creditors ...'.

**[208]** On the right to inspect the PODs and supporting documents of other scheme creditors, in *TT International*, the Singapore Court of Appeal held at [93] that a scheme creditor is entitled to examine the proofs of debt submitted by other scheme creditors in respect of a proposed scheme, as long as the information sought was relevant to his voting rights. However, the scheme creditor is entitled to access only if he had produced prima facie evidence of impropriety in the admission or rejection of the proofs of debt. Where a scheme creditor's request for disclosure of other scheme creditors' proofs of debt was rejected by the scheme company, the scheme creditor can apply to court for an order that the PODs and supporting documents be disclosed to it.

**[209]** The Singapore Court of Appeal recognised the chairman's argument that if individual creditors were allowed to challenge the chairman's decisions on the adjudication and admission of proofs of debt, the more difficult it might be to proceed with the scheme, and this may unnecessarily frustrate the supporting creditors while letting the scheme company's condition deteriorate.

**[210]** The Court of Appeal in *TT International* also cited with approval at [86] the Singapore Court of Appeal decision in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR 629; [2003] SGCA 23. There, the Singapore Court of Appeal had remarked that a precondition for the scheme company to satisfy each creditor of the extent of all its debts prior to the voting would be 'cumbersome and administratively inconvenient':

> *If it were a condition precedent that a company had to satisfy each creditor of the genesis and extent of all of its debts before the scheme could be put to the vote, the entire process would be cumbersome and administratively inconvenient*, especially when the scheme might itself already provide for a procedure for the adjudication of claims for voting purposes (as it did in this case). Any remaining concerns, therefore, were better dealt with on a discretionary basis. (Emphasis added.)

**[211]** By applying *Wah Yuen*, it is not a precondition for IJSB to satisfy each scheme creditor of the extent of its debts prior to the scheme meeting, especially where there is already a procedure for the adjudication of claims in place.

**[212]** Furthermore, by applying *TT International*, neither Seng Long or SESB has produced any prima facie evidence of impropriety in the admission or rejection of the PODs by the scheme chairman in order to be entitled to the PODs requested. They were at liberty to apply to this court for a disclosure order, but they did not do so.

**[213]** In any event, the applicants have produced for this court the POD forms and the supporting documents as filed by TBCB, IJSB and IESB.

**[214]** In truth, the reason for the requests to inspect the PODs and supporting documents had to do with the objection to the PODs filed by the unsecured creditors who are related to the applicants. As will be seen, if the votes of the related creditors were to be excluded or discounted, this would have a significant impact on the outcome of the scheme meetings to meet the requisite statutory majority. There were also suspicions on the accuracy of the adjudicated debts of the related creditors since the audited financial statements of the applicants were not available.

**[215]** This gives rise to the legal issue as to whether the class was fairly represented by the unsecured scheme creditors which attended the scheme meetings. This is the second element to be satisfied by the applicants to meet the sanction of this court.

*Whether class of creditors fairly represented at scheme meetings*

**[216]** The objections by the opposing scheme creditors against the related party creditors deal with the second element alluded to above and can be classified into four areas.

**[217]** Firstly, some of the opposing scheme creditors allege that for the IJSB scheme, some of the related party creditors' scheme debts should be discounted to zero. That discounting, depending on what configuration or calculation used by the opposing scheme creditors, would result in only 62% in value of creditors having voted in favour of the IJSB scheme — failing the statutory majority.

**[218]** Learned counsel for Seng Long forcefully submitted that the Group own creditors votes ie the related company creditors, ought not be taken into account for the purposes of determining whether the majority of unsecured scheme creditors voted for the IJSB scheme, such as to cross the 75% threshold.

**[219]** Much reliance was placed on the Singapore Court of Appeal's case of *TT International* where Justice VK Rajah JA held that:

> (10) The *votes of related party creditors should have been discounted because of their special interests to support the proposed scheme by virtue of their relationship to the Company*. The votes of *wholly-owned subsidiaries should have been discounted to zero and effectively classified separately from the general class of unsecured creditors since they were entirely controlled by their parent company* (ie, the Company in this case). Otherwise, *related party creditors should generally have their votes discounted by the value of their interest in the company*: at [155], [158] and [170]. (Emphasis added.)

**[220]** Justice VK Rajah JA further expressed that:

152 In *UDL Argos* at [27] (see above at [58] and [130]), Lord Millett NPJ set out a key overriding principle regarding the treatment of votes by related party creditors. It is as follows:

> (6) The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. *To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question*. (Emphasis added.)

153 In *Wah Yuen* ([77] supra), this court adopted Lord Millett NPJ's view (at [27(3)] of UDL Argos, see [130] above) that related party creditors do not have to vote as a separate class simply because they are related creditors. This court held (*Wah Yuen* at [13]):

> Counsel for *Wah Yuen* correctly submitted that related party creditors did not constitute a separate class of creditors for voting purposes simply because they were related parties. This is because 'the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings': *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin*. (Emphasis added.)

154 However, this court went on to observe (at [35]):

> Although *related party votes are counted for purposes of determining whether the statutory majority has been reached, the courts have consistently attributed less weight to such votes when asked to exercise their discretion in favour of a scheme*. This is because the related party may have been motivated by personal or special interests to disregard the interests of the class as such and vote in a self-centred manner. In the present case, we found no reason to abandon our traditional reserve because *Wah Yuen*'s continued reticence the related party debts prevented the court from making a competent assessment of the bona fides of the related party votes. (Emphasis added.)

155 Taken together, the *authorities say with one voice that it is the norm for the votes of related party creditors to be discounted in light of their special interests to support a proposed scheme by virtue of their relationship to the company.* The Judge in fact noted at [47] of her Judgment that she was 'entitled to attach less weight to [the related parties'] views in [her] overall decision whether to approve the Scheme because of their special interest in the [Respondent] and the Scheme', but she did not do this in making her final decision. In our view, she erred here as there was no reason to depart from the norm. (Emphasis added.)

**[221]** The Singapore Court of Appeal in *TT*'s case expressed that:

158 In our view, the *votes of wholly-owned subsidiaries should be discounted to zero*.

Wholly-owned subsidiaries are entirely controlled by their parent company, ie, the Respondent in this case. Indeed, we view the Respondent's wholly-owned subsidiaries as extensions of the Respondent itself. If the Respondent were to wind up any of its wholly-owned subsidiary creditors, the debts owing to those wholly-owned subsidiary creditors (save for those debts owed by the wholly-owned subsidiary creditors to genuine third party creditors) would be extinguished and the assets of the wholly-owned subsidiary creditors would be the Respondent's. Significantly, the *votes of the wholly-owned subsidiary creditors at creditors' meetings are undoubtedly entirely controlled by the Respondent*.

159 Our view in assessing the proofs of wholly-owned subsidiary companies is in line with the approach adopted in the Supreme Court of New South Wales decision of *Re Landmark Corporation Ltd* [1968] 1 NSWR 759. In that case, Street J was faced with a petition to approve a scheme of arrangement for a company called Landmark Corporation Ltd ('Landmark'). At the court-convened meeting, votes in favour of the scheme were cast by creditors to whom Landmark owed AUD$2,506,984, but *this amount included AUD$1,526,097 which was owed to seven of Landmark's wholly-owned subsidiaries or sub-subsidiaries.*

160 Street J held (at 766) that these creditors were correctly admitted to vote in the class of unsecured creditors and that the statutory majority was obtained so that he had jurisdiction to approve the scheme. However, he had remarked (at 765) that *'[t]heir votes accordingly must be regarded as cast with due deference to the wishes of [Landmark]'*. He went on to elaborate (at 767) as follows:

> The associated companies whose claims amount to [AUD]$1,526,097 were, as I have already stated, voting in favour of the scheme at a point of time when their affairs were wholly controlled by their parent company, there being no receiver or liquidator or external control in any of these associated companies. It is difficult to attribute to the management of these associated companies any motive which would differ from the motive of [Landmark] itself. I am of the view that their votes could have little, if any, weight when using the voting at the meeting as having probative force in establishing what is best in the interests of the class of ordinary unsecured creditors. It would be rare in circumstances such as these for a wholly-owned subsidiary, whilst still entirely within the control of its parent, to be permitted to have any significant weight attached to its vote at a meeting under s 181. Whilst in law the entities are separate, when it comes to exercising discretion under s 181 the Court is concerned with the reality of the situation, and I cannot regard the votes of the associated companies as indicative of the wishes of members of the class of unsecured creditors in respect of what is best to be done in the interests of that class. These claims totalling [AUD]$1,526,097 will carry little weight.

161 Street J went on to consider that of the external creditors who voted, those who voted against the scheme were owed AUD$456,000 while those who supported the scheme were owed only AUD$93,000 (which he arrived at after deducting, for other reasons, certain other sums from the difference between AUD$2,506,984 and AUD$1,526,097). He noted (at 767) that he had to 'be slow to differ from so clear a guide as to what the external creditors themselves regard as best in the interests of

their class'. In the prevailing circumstances, Street J decided not to approve the scheme.

> 162 Street J *effectively weighted the votes of Landmark's wholly-owned subsidiaries and sub-subsidiaries to zero. We think that this was right.* In this matter, we likewise considered it correct to exclude the Respondent's wholly-owned subsidiaries from the general class of unsecured Scheme Creditors and directed that they vote with the Scheme Creditors whose claims would be subordinated in a liquidation pursuant to s 250(1)(g) of the Act (see above at [147]). *We were of the view that this was a clearer and fairer treatment of the wholly-owned subsidiaries, notwithstanding that technically, they did not appear to have different legal rights as against the Respondent than those enjoyed by the general class of unsecured Scheme Creditors (cf the test for the classification of creditors at [130]–[131] above)*. (Emphasis added.)

**[222]** On the discounting of votes, the Singapore Court of Appeal in *TT International* expressed that:

> Ms Tong and KBC Bank
>
> 170 Ms Tong was a related party creditor in respect of her shareholder's loan to the Respondent as she was a *shareholder* of the Respondent (see above at [16] and [151]). KBC Bank was a related party creditor because the banking facilities which it provided to the Respondent were secured by shares in the Respondent. In our view, the sensible approach was to allow Ms Tong (if she chose to relinquish her ROFRs — see [151] above) and KBC Bank to vote in the general class of unsecured Scheme Creditors but discount their respective votes by the value of the Respondent's shares that was owned (in Ms Tong's case) or that was used to secure the claim (in *KBC Bank*'s case) as of the Ascertainment Date.
>
> 171 Therefore, we made the following order (with accompanying footnotes) (see Annexure I at [6]):
>
> If Ms Tong chooses to vote as a related creditor, *her vote should be discounted by the value (as of 31 July 2009) of the shareholding she has in the Respondent*. Similarly, KBC Bank NV's vote should be discounted by the value (as of 31 July 2009) of the Respondent's shareholding that secures the banking facilities which KBC Bank NV has provided.
>
> *For example, if Ms Tong has an admitted claim of $10 (none of which is a 'Subordinated claim ' as above) but holds shares in the Respondent worth at the Ascertainment Date $6, then she should only be allowed to vote $4 of her claim.*
>
> For example, if KBC Bank NV has an admitted claim of $10 but its banking facilities provided to the Respondent are secured by the Respondent's shares worth at the Ascertainment Date $6, then KBC Bank NV should only be allowed to vote $4 of its claim. (Emphasis added.)

**[223]** Premised on the above case law, this court was urged to give less weight and or altogether discount the votes of a related party creditor (whether shareholder, wholly-owned subsidiary, and sub-subsidiary) in relation to the IJSB scheme. This was on the premise that:

(a) it is the norm for the votes of related party creditors to be discounted in light of their special interests to support a proposed scheme by virtue of their relationship to the company;

(b) although related party votes are counted for purposes of determining whether the statutory majority has been reached, the courts have consistently attributed less weight to such votes when asked to exercise their discretion in favour of a scheme;

(c) the votes of wholly-owned subsidiaries should be discounted by the court to zero, and effectively classified separately from the general class of unsecured creditors since they were entirely controlled by their parent company;

(d) it is a clearer and fairer treatment of the wholly-owned subsidiaries that their votes are to be discounted to zero, notwithstanding that they may very well fall within the same class of as other unsecured scheme creditors;

(e) shareholders should generally have their votes discounted by the value of their interest in the company; and

(f) the sensible approach is to allow the shareholder and any related party creditor to vote in the general class of unsecured scheme creditors but to discount their respective votes by the value of the company's shares that was owned by the shareholder or the interest which it had in the shares of the applicant as of the cut-off date. For example, if the shareholder has an admitted claim of $10 but holds shares in the applicant worth at the cut-off date $6, then he should only be allowed to vote $4 of his claim.

**[224]** In the present case, the third applicant and IJ Geotechnic Sdn Bhd are the second applicant's wholly-owned subsidiaries, and the first applicant is the sole shareholder of the second applicant. Both the third applicant and IJ Geotechnic Sdn Bhd are the extensions of the second applicant itself. This means that the votes of these wholly-owned subsidiary creditors at the court convened meeting are undoubtedly entirely controlled by the second applicant.

**[225]** Applying the principles from *TT International* and *Re Landmark Corporation Ltd* [1968] 1 NSWR 759, it was contended that the votes of the wholly-owned subsidiary creditors (third applicant and IJ Geotechnic Sdn Bhd) must be discounted to zero; or alternately the third applicant and IJ Geotechnic be classified into a different class of creditors, as they have different rights and special interest in the success of the IJSB scheme, more so when the third applicant's IESB Scheme is inter-conditional upon the success of the IJSB scheme.

**[226]** The first applicant being the sole shareholder of the second applicant

would have special interest to support the second applicant's IJSB scheme since:

(a) the first applicant had invested in the second applicant, where it owns all 30,000,000 unit of shares in the second applicant with total issued share capital of RM30m; and

(b) the first applicant's TBCB Scheme is conditional on the success of the IJSB scheme and IESB Scheme.

**[227]** It was contended that all the applicants (inclusive of the first applicant and third applicant) are the promoters of the schemes including TBCB Schemes, IJSB schemes and IESB Schemes. By virtue of their relationship to the second applicant, being its sole shareholder or its wholly-owned subsidiary, the first applicant and third applicant must have special interest in voting for the IJSB scheme.

**[228]** Since shareholders should generally have their votes discounted by the value of their interest in the company, in this instance the first applicant's vote in the IJSB scheme should be discounted by RM30m being the book value of the shares according to the Companies Commission of Malaysia search dated 28 December 2020. It was submitted that the vote of the first applicant ought to be discounted to zero and be separated from the general class of unsecured scheme creditors since the first applicant's interest in the IJSB scheme now overlaps with its interest in the TBCB Scheme.

**[229]** In the event that the group creditors'/inter-company creditors'/related company creditors' votes were to be discounted to zero (where the votes to be discounted to zero focuses on the third applicant, IJ Geotechnic Sdn Bhd and first applicant), the tabulation of the votes voting for and present at the second applicant's court convened meeting would read as follows:

| No | | Adjudicated Debt as at 31 December 2020 under the IJSB Scheme (MYR) | % of votes voted for the IJSB Scheme at the Scheme Meeting before the votes of the Group Creditors are discounted to zero | Remaining votes after the votes of the Group Creditors are discounted to zero (MYR) | % of votes voted for the IJSB Scheme at the Scheme Meeting after the votes of the Group Creditors are discounted to zero |
|---|---|---|---|---|---|

| | | | | | |
|---|---|---|---|---|---|
| 1 | Ikhmas Equipment Sdn Bhd (third applicant) | 83,045,204 (Item 1) | 20.90% | 0 | |
| 2 | IJ Geotechnic Sdn Bhd | 2,502,392 (Item 2) | 0.63% | 0 | |
| 3 | Top Builders Capital Bhd (first applicant) | 110,816,801 (Item 3) | 27.89% | 0 | |
| 4 | Total votes present and voting for the IJSB Scheme | 21,852,260 (Item 4) | 80.99% | 125,487,863 (A) | 62.42% (C) |
| 5 | Total Adjudicated Debt of Unsecured Scheme Creditors present and voted at the Scheme Meeting | 397,398,415 (Item 5) | | 201,034,018 (B) | |

**[230]** In the event that this court were to discount the wholly-owned subsidiary creditors' (third applicant's and IJ Geotechnic Sdn Bhd's) votes to zero as urged, and to discount the shareholder's (first applicant's) interest in the second applicant, being the value of the total issued capital, RM30m, the tabulation of the votes voting for and present at the second applicant's court convened meeting would be as follows:

| No | | Adjudicated Debt as at 31 December 2020 under the IJSB Scheme (MYR) | % of votes voted for the IJSB Scheme at the Scheme Meeting before the votes of the wholly-owned subsidiary creditors are discounted to zero | Remaining votes after: the votes of the wholly-owned subsidiary creditors are discounted to zero; the votes of the shareholder after the value of the interest in IJSB is discounted (MYR) | % of votes voted for the IJSB Scheme at the Scheme Meeting after the votes of the Group Creditors are discounted |
|---|---|---|---|---|---|
| 1 | Ikhmas Equipment Sdn Bhd (third applicant) | 83,045,204 (Item 1) | 20.90% | 0 | |
| 2 | IJ Geotechnic Sdn Bhd | 2,502,392 (Item 2) | 0.63% | 0 | |
| 3 | Top Builders Capital Bhd (first applicant) | 110,816,801 (Item 3) | 27.89% | 80, 816,801 (Item 6) | |
| 4 | Total votes present and voting for the IJSB Scheme | 321,852,260 (Item 4) | 80.99% | 125,487,863 (A) | 73.20% (C) |

| | | | | | |
|---|---|---|---|---|---|
| 5 | Total Adjudicated Debt of Unsecured Scheme Creditors present and voted at the Scheme Meeting | 397,398,415 (Item 5) | | 281,850,819 (B) | |

**[231]** Premised on the above, the applicants, particularly the second applicant would not meet the statutory requirement of 75% with respect of the approval of the IJSB scheme. Taking into consideration the tabulation above, the actual percentage value of creditors present and voting for the IJSB scheme, if at all, should read as falling on 62.42% or at best 73.20%. Accordingly, it was contended that this court ought to dismiss the applicants' application for sanction of the IJSB scheme annexed in Annexure A2 of encl 83.

*Court's deliberation*

**[232]** Notwithstanding what was stated by Justice VK Rajah JA in *TT International*, it would seem that the discounting of the votes of wholly owned subsidiaries creditors is not a universal approach by all courts. Indeed, there is no absolute rule, nor is there any exact mathematical formula, for the votes of intercompany creditors and/or related party creditors to be discounted or disregarded.

**[233]** In *UDL Holdings*, there were separate schemes of arrangement for the restructuring of seven companies under the UDL group. Each scheme had just one class of unsecured creditors. A group of creditors brought the argument that the 'internal creditors' of the UDL group should not be classed together with the other unsecured creditors and should have been treated as a separate class.

**[234]** The Hong Kong Court of Final Appeal dismissed this argument, holding that the test for classification was based on the similarity or dissimilarity of legal rights against the company. The court also upheld the decision of the courts below not to discount the votes of the subsidiaries of the scheme company, even though a significant number of these subsidiaries were wholly owned. The relevant paragraphs are set out below:

> The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The

A fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.

...

B Internal creditors. The contention that internal creditors should have been treated as a separate class is contrary to the decisions in Re Jax Marine Pty Ltd and Re Landmark Corporation Ltd which were in accordance with principle and which I have no doubt were rightly decided. The internal creditors, and particularly the companies which were putting their own Schemes forward, undoubtedly had a C special interest in promoting the Schemes, but this did not disqualify them from being treated as ordinary creditors. The Court was bound to take their presence into account when considering whether to exercise its discretion to sanction the Schemes, but it was not debarred from doing so.

D **[235]** *UDL Holdings* was applied by our court in *Transmile Group Bhd & Anor v Malaysian Trustees Bhd & Ors* [2012] MLJU 130 which was later upheld in the Court of Appeal (see *Malaysian Trustees Bhd v Transmile Group Bhd & Ors* [2012] 3 MLJ 679). In *Transmile*, one of the creditors argued that certain creditors had other interests in voting for the scheme because it would benefit E them in a related scheme as monies would then be pumped into that related scheme. The court, following *UDL Holdings*, held that the unsecured creditors were correctly placed in one class in so far as their legal rights are concerned, and there was no 'special interest' or benefit. The relevant paragraphs are set out below:

F

[46] However in the *Re UDL* case it was further held that the mere fact that a group of shareholders stands to receive a benefit under the scheme by virtue of occupying some other position vis a vis the company, such as the status of a creditor, does not warrant their being treated for voting purposes as a class separate from the those who do not occupy that additional position. Lord Millet at p 182 of the case referred to G and cited a passage from the case of *Re Jax Marine Pty Ltd* [1967] 1 MSWR 145:

> ... The fact that this group have an additional interest from the ordinary creditors does not, however, appear to me to go to the length of making their rights so dissimilar from those of the ordinary creditors as to make it impossible for them H to consult together... The existence of this motive or personal interest does not, in my view, preclude the Smithson group from membership of the class of ordinary unsecured creditors ...

...

I The finding of the court that the entire group of unsecured creditors are to rank pari passu places them in one class in so far as their legal rights are concerned and the issue of a 'special interest' or benefit neither arises on the factual matrix here nor warrants separate classification. It cannot be reasonably concluded that such unfairness or oppression on the part of the majority has been demonstrated so as to warrant the withholding of sanction.

**[236]** The English High Court in *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch) ('Lehman') has elucidated the approach to be adopted to the discounting of insider creditors' votes. Having surveyed various authorities on this issue, Hildyard J was of the view that the court may either (a) discount the weight given to the majority vote and consider the fairness of the scheme without adopting any particular presumption in favour of the majority or (b) altogether disregard the relevant votes of 'special interest' creditors so that the relevant votes are void, and do not count at all towards the statutory majority, in which case if the requisite majorities are not achieved the scheme must fail.

**[237]** In Hildyard J's view, the court has always been, and should always be, especially disposed to guard against coercion of a minority by a self-interested majority. In addressing allegedly unrepresentative votes, the court discretion is to be exercised according to all the circumstances of the case, including (often most importantly) the level of support from unconnected creditors and the court's view of the balance of benefit offered by the scheme.

**[238]** In that case, the scheme was approved by the requisite majorities of each class at the creditor voting meetings. At the sanction hearing, the court assessed whether the members of the Wentworth Group, who comprised a significant proportion of the higher rate creditors, had 'special interests' that were different from the other members of that class, which motivated their voting.

**[239]** The court in *Lehman* declined to exercise its discretion to disregard the votes of the Wentworth Group or to refuse to sanction the scheme on fairness grounds. Hildyard J accepted that the interests of the Wentworth senior creditors were not only 'special interests', but were also in a sense 'adverse' to the interests of other higher rate creditors. However, the court found that the special interests of the Wentworth Group were not their dominant reason for voting in favour of the scheme. The scheme's overriding objective, namely the speedy distribution of the surplus to creditors, again featured in the court's reasoning and was recognised as the driving force behind the creditors' voting. This reasoning was borne out by the voting results themselves, which showed that an overwhelming majority of the 'independent' higher rate creditors had also voted in favour of the scheme.

**[240]** To my mind, whether the votes of intercompany creditors and/or related party creditors are to be discounted or disregarded is a matter of discretion for the court when considering whether or not to sanction the scheme based on the particular facts of the case before the court.

**[241]** In the exercise of the discretion, the court will consider whether the

benefits that the creditors would likely derive from the scheme are clearly better than the alternative liquidation scenario, whether there is any clear and obvious likelihood of the creditors achieving a better scheme, whether the exercise of the votes by the intercompany creditors and or related party creditors was driven by any special or ulterior interest that was 'adverse' to the interests of the creditors, whether the opposing creditors pressing for the votes of the intercompany creditors and or related party creditors to be discounted or disregarded have any self-interest and or ulterior motive, whether the adjudicated debts of the intercompany creditors and or related party creditors are genuine or questionable and whether the percentage of independent creditors who had voted in the scheme is such that it reflects a desire on the part of an overwhelming majority in value and in number of the scheme creditors wanting the scheme.

**[242]** In our instant case, the opposing creditors have not demonstrated to this court that the scheme creditors would be better off without the IJSB scheme and or that there is a good possibility that the applicants were in a position to significantly improve on the current scheme. Whilst it is always true that there are risks that even after sanction is granted for the schemes, there are possibilities that the schemes could not be implemented, there is little evidence that the applicants and the White Knight are otherwise than genuine and bona fide in their commitments to see through the schemes.

**[243]** The fact that the intercompany creditors and the related company creditors may have a separate and or 'special interests' to see the continuity of the TBCB Group as a going concern, this alone without more, cannot be a reason to disregard their votes. Although there are concerns as regards the correctness of the quantum adjudicated as debts due to the related company creditors given that the audited financial statements for the TBCB Group have not been prepared, there is no evidence to suggest that these debts are not genuine debts. In any case, an appropriate order can be made to address the concerns on the accuracy of the adjudicated debts.

**[244]** More specifically, there is no evidence that the 'special interests' of the intercompany creditors and or related company creditors are adverse to the interests of the other scheme creditors. I have also taken on board the fact that a high majority in value and number of the independent creditors in the present case had voted in favour of the IJSB scheme.

**[245]** As such, I would respectfully decline to follow *TT International* and would reject the contention by the opposing scheme creditors to disregard the votes of the intercompany creditors and related company creditors.

**[246]** Indeed, it is difficult to appreciate the distinction between wholly

owned subsidiaries and other 'related party' creditors when considering the issue of discounting their votes. In *TT International*, the Singapore Court of Appeal held at [158] and [165] that the votes of related creditors who are wholly-owned subsidiaries of a scheme company would be discounted to zero whilst at [170] it held that where a creditor is related to the company by virtue of its shares in the company, its vote shall be discounted by the value of these shares as at the ascertainment date ie a *partial* discount.

**[247]** I am not persuaded that an approach based on the percentage of shareholding of a related company is the way to go. Indeed, in the subsequent Singapore Court of Appeal case of *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal* [2017] 2 SLR 898; [2017] SGCA 51 ('SK Engineering'), the Court of Appeal re-visited this issue and held at [41] that:

> it is not possible to proffer a definitive statement of what would constitute a related creditor as the objectivity of a creditor can be undermined in a variety of ways. Whether or not a particular creditor is a related creditor of a scheme company ultimately involves a fact-sensitive and fact-intensive analysis.

**[248]** Whilst it did not lay down a definitive rule, the Singapore Court of Appeal set out at [41] the following list of non-exhaustive factors that may establish a related creditor:

(a) the scheme company controls the creditor or vice versa; or they share a common *controlling* shareholder (ie more than 50% shareholding);

(b) the creditor and scheme company have common shareholder(s) who hold less than 50% but more than *de minimis* stake in both companies;

(c) the creditor and scheme company have common director(s), in particular, director(s) who propose or support the scheme;

(d) the creditor or scheme company do not have common shareholder(s), but their controlling shareholder(s) are either (i) related by blood, adoption or marriage; or (ii) where the controlling shareholder(s) are corporate entities, these are in turn controlled by individual(s) who are related by blood, adoption or marriage; and

(e) the creditor is related by blood, adoption or marriage to the controlling shareholder(s) or director(s) of the scheme company.

**[249]** After outlining the non-exhaustive factors for establishing what constitutes a 'related party', the Singapore Court of Appeal proceeded to indicate, in obiter dicta, that a partial discount as adopted in *TT International* is unlikely to be adopted in Singapore. In particular, the Court of Appeal had observed that:

(a) no jurisdiction other than Singapore (in *TT International*) has applied a partial discount on the votes of related creditors: see [66];

(b) partial discount is 'inevitably arbitrary and subjective, and not amenable to definitive guidance' in light of the variety of scenarios in which a creditor may be related to the scheme company: see [67]; and

(c) a more principled approach is to wholly discount the votes of the creditor once it is found to be related to the scheme company: see [67]. Andrew Phang JA drew the analogy that if ink had spilled into a glass of water, then the entire water content would be tainted; there is no difference whether the spill was a few drops of ink or the entire bottle of ink, which the Chief Justice concurred.

**[250]** Thus, to my mind, the focus ought to be on the manner in which the related party creditor had exercised its vote rather than its percentage of shareholdings in the applicant company.

**[251]** Accordingly, for the reasons which I have set out above, I am not inclined to disregard the votes of any of the intercompany creditors and or the related company creditors in the present case.

*Whether commercial and reasonable man would approve schemes*

**[252]** We come to the final third element for sanction, namely, whether the applicants' schemes of arrangement are ones that any commercially minded and reasonable man would approve of.

**[253]** On this point, I agree with learned counsel for the applicants that this element too has been satisfied for the reasons set out below:

(a) firstly, the proposed debt resolution under the schemes of arrangement offers the unsecured scheme creditors a better recovery of 30% of their debts than they would receive if the applicants were wound up. There is better recovery than under a liquidation scenario where the recovery would be between nil to 9% and as confirmed by EY's analysis dated 4 August 2021;

(b) secondly, the proposed debt resolution offers an upfront cash payment of 10% to all its unsecured scheme creditors. In these tough economic times, the requisite majority of the unsecured scheme creditors present and voting had made the commercial decision to take the applicants' offer. The remaining 20% is through the issuance of TBCB ordinary shares to the scheme creditors;

(c) thirdly, the schemes of arrangement involve an investor in the form of the White Knight. The White Knight has already shown its commitment

towards the rescue and restructuring of the applicants' business. The White Knight evidently sees the commercial value in the business and operations of the applicants. With the stabilisation and recovery of TBCB, its value in the TBCB ordinary shares would also increase and the Scheme Creditors will ride the upside along with TBCB's recovery; nad

(d) fourthly, the approval of the schemes of arrangement allows for the applicants to continue as a going concern. It ensures the TBCB Group's existing contracts and operations continue unimpeded, and the business remains viable and sustainable to generate positive earnings before interest, taxes and depreciation ('EBITDA') and cashflow. In turn, the unsecured scheme creditors may continue doing business with the applicants. Further, the Intercompany Creditors have agreed to waive their right to distribution under the schemes of arrangement, to allow for any capital to be channelled towards supporting the business.

**[254]** As a matter of commercial comparison, there have been conflicting views presented by the parties. SESB has presented an independent expert's report prepared by Roger Yue & Associates, purportedly dated 2 September 2021, but dated 25 August 2021 ('RYA Report') and the RYA Reply dated 8 November 2021.

**[255]** The applicants' independent financial advisors Messrs Ernst & Young ('EY') have prepared their response as well as further elaboration on other issues or concerns, and all of these issues may be relevant to also address the concerns of the opposing scheme creditors in these proceedings.

**[256]** In summary, the RYA's position has been that:

(a) RYA claims that in reviewing the TBCB and IJSB ES, there was no statement of the financial information that has been duly audited. It is in their view that such financial information 'forms the crux' of informed decision making for Scheme Creditors;

(b) as an expert, RYA makes a serious accusation that the inclusion of the inter-company and related party creditors together was deliberate in order to facilitate the voting process to ensure that the schemes would be pushed through;

(c) RYA makes the legal argument that SESB's claims admitted into the IJSB scheme as an unsecured scheme creditor was incorrect as it failed to acknowledge that there is a proprietary element in the advance payments made, and have ignored the 'fact' that the relevant contract is on-going. SESB should have been categorised as a project creditor;

(d) RYA alleges that the treatment of SESB's POD in the TBCB Scheme was also incorrect and the entire amount of RM26,036,318.36 should not have been 'reduced to RM12,000,000';

(e) RYA's reply raises the issue of TBCB's non-compliance in submitting its annual audited financial statements, which is a concern as part of the proposed debt settlement includes the issuance of TBCB ordinary shares;

(f) RYA's reply claims that in reality the control of all the inter-company and related party creditors are 'in the hands of the same people whether in TBCB or IJSB'; and

(g) RYA's reply conversely states that there is no disputing that the SESB's advance payment is not secured against any assets of IJSB or the TBCB Group. However, they claim that SESB is a customer of IJSB and SESB should still retain a proprietary right over the advance payments.

**[257]** EY's replies have set out that:

(a) the TBCB, IJSB and IESB audit period has now changed to 30 June 2021. There is no requirement for the financial information to be presented in the ES to be audited, EY has relied on the company's unaudited financial information. The relevant cut-off date is 31 December 2021;

(b) the composition of directors in TBCB and IJSB are different. The scheme reflects each entities' right of recourse for its claims against the outstanding amounts, and the position of creditors in the event of an insolvency or liquidation. Each intercompany remains entitled to their claims against the applicants. Any waiver of its entitlement will only occur if there is sanction of the scheme;

(c) the advance payments made to SESB are not secured against any assets of the IJSB or the TBCB Group. SESB does not have any priority claim. SESB is not involved in any ongoing project where existing proceeds are sufficient to meet its obligations;

(d) SESB's claim against TBCB is pursuant to the corporate guarantee agreement dated 13 September 2019. The terms of the corporate guarantee dated 13 September 2019 stipulate that the claim against TBCB is limited to a maximum of RM12m;

(e) TBCB is subject to the PN17 Relief Measures, and that the ongoing restructuring efforts have hampered its ability to issue the audited annual report. The suspension of TBCB is a technical suspension until the annual audited financial statements is released;

(f) EY's response to RYA's teply explains that RYA has essentially raised a legal argument in relation to the classification of the scheme creditors;

(g) EY's response to RYA's teply sets out that as the financial advisors, they are not in a position to speculate or second-guess the business judgment made by the directors and applicants. That said, there is an objective benefit for the TBCB Group to agree to a waiver to ensure the TBCB Group remains on stronger financial footing; and

(h) EY's response to RYA's teply reiterates that based on legal advice, SESB does not have a proprietary claim, and they are correctly classified along with all other unsecured scheme creditors.

**[258]** The independent financial advisors, as stated by EY, are not in the position to second guess the business and commercial decisions made by the relevant parties.

**[259]** After evaluating the opinions as expressed by EY and RYA, I am satisfied with EY's responses and I agree that the schemes of arrangement are one in which any commercial and reasonable man would approve of. The unsecured scheme creditors of the applicants have in fact made that commercial decision.

**[260]** Accordingly, it is my judgment that the third element necessary for the sanction has indeed been met by the applicants.

*Damai 88 Project*

**[261]** Before concluding my judgment, I must also address the objection to the schemes raised by Edwincom pertaining to the Damai 88 project.

**[262]** The Damai 88 project was said to have adversely impacted the performance of the applicants' whole group but what remains ambiguous is the number of units of service apartments that were in fact received by the group in debt settlement.

**[263]** At the introduction part of the applicants' schemes of arrangement, it was stated that the *outstanding payment* for the project was settled via 35 contra units valued approximately at RM50.9m.

**[264]** Mr Yong Kok Yee, as the independent non-executive director of the first applicant in his affidavit at encl 2 represented that the Group received 6 units in debt settlement.

**[265]** By a consent judgment dated 24 June 2020 entered between the first and second applicants with Sykt Logam pursuant to Shah Alam High Court Civil Suit No BA-22NCvC-378–09 of 2019, it was recorded that 12 contra

A units valued at RM24,712,500 by the first and second applicants were to be transferred to the said creditor, with particulars as follows:

(a) Unit Nos 8–3, 13–2, 15–2, 15–7, 13A-7, 15–9, 17–3, 15–3A and 13A valued at RM14,137,500; and

B (b) Unit Nos 10–10, 12–9, 13–10 and 13–A10, valued at RM10,757,000.

**[266]** Further, the contra unit that the second applicant promised the third respondent together with another two other subcontractor creditors for the Damai 88 project was Unit 11-3, valued at RM1,172,684.58. The deed of settlement in exh 'LWCA8' at cl 1.2 and 1.3 provide that:

C

> 1.2 *IJSB is the lawful and/or beneficial owner of the Contra Unit* vide a Settlement Agreement dated 17.04.2017 and a Supplementary Agreement dated 17.07.2017 between IJSB and D.J. Design & Suppliers Sdn. Bhd. as the Vendor and Solid
>
> D Promenade Sdn. Bhd. as the Proprietor.
>
> 1.3 In exercising its rights under the said Agreements, IJSB had nominated EPMSB to enter into a Sale and Purchase Agreement dated 17.04.2017 with the said Vendor and Proprietor in respect of the Contra Unit ... At all material times, EPMSB accepts and confirms that the Contra Unit is being held beneficially by EPMSB for
>
> E the sole benefit of IJSB.

**[267]** 'EPMSB' above refers to Exofield Property Management Sdn Bhd ('Exofield') a wholly owned subsidiary of the first applicant and from the records furnished by the applicants, EPMSB is also a scheme creditor of the

F second applicant with an adjudicated debt of RM1,437,500.

**[268]** How many of the Damai 88 contra units did the applicants in fact receive from the project and how many were held beneficially by EPMSB

G and/or other persons nominated by the second applicant is not clear. The third respondent expressed concern that the applicants may not have disclosed the contra units that were received for the purposes of the schemes of arrangement.

**[269]** There appears to be some basis for this concern.

H

**[270]** The third respondent highlighted the fact that from information extracted from the Companies Commission of Malaysia's records there were at least four units of Damai 88 service apartments that appeared to be beneficially owned by Exofield which were assigned to financial institutions for financing

I facilities whereby one of it is for the benefit of BE Specialist Sdn Bhd ('BE').

**[271]** Both Exofield and BE are wholly/partially-owned subsidiaries of the first applicant and from the records furnished by the applicants, both Exofield and BE Specialist are also scheme creditors of the second applicant with

adjudicated debts of RM1,437,500 and RM2,085,001 respectively. For the records, Exofield is a RM2 paid up capital company while BE is a RM250,000 paid up capital company.

**[272]** Although the applicants in encl 123, p 40 para 59 stated that the four contra units of Damai 88 service apartments belonged to Exofield, there appear to be evidences to show that Exofield are holding the properties for IJSB, the second applicant.

**[273]** During oral submissions, learned counsel for the applicants was unable to satisfactorily explain the inconsistencies regarding the various statements made pertaining to the Damai 88 units notwithstanding the assurances given to this court that there was no concealment of any such units by any of the applicants.

**[274]** After pondering over this issue, I asked learned counsel for the third respondent if they would be satisfied if a suitable order is made as a condition for the sanction that EY, as the restructuring advisor for the applicants' schemes of arrangement be directed to conduct an audit on all, if any, of the Damai 88 units that were in fact transferred and or assigned from the developer, DJ Design & Suppliers Sdn Bhd to the applicants and or their nominees and that any such units found to be credited as part of the assets of the applicants for additional distribution to the creditors.

**[275]** Learned counsel for the third respondent had indicated that they were agreeable to such terms. This will be reflected in the order made herein for the sanction of the schemes of arrangement.

CONCLUSION

**[276]** In the premises, the test for this court on sanction is that whether the applicants' schemes of arrangement are 'such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'.

**[277]** Lewison J in the English High Court scheme sanction decision of *Re British Aviation Insurance Co Ltd* [2006] 1 BCLC 665 reiterated at [74] the above test. Further, Lewison J reiterated at [75] that 'the test is not whether the opposing creditors have reasonable objections to the scheme. A creditor may be equally reasonable in voting for or against the scheme. In such a case Mr Moss submitted that creditor democracy should prevail. Where, as here, those who voted in favour of the scheme are large and sophisticated corporations, the rigid application of this test as the sole criterion would rarely, I think, enable the court to refuse to sanction a scheme'.

**[278]** Finally, Lewison J noted at [76] that 'none of the very experienced counsel in the case was able to show me a case in this jurisdiction in which the court, having decided that it had jurisdiction to sanction a scheme, nevertheless refused, as a matter of discretion, to do so'.

**[279]** In conclusion, I hold that the applicants have met the required elements for sanction of their schemes of arrangement. To paraphrase *Re Top Builders* at [62] of the decision, the greater good of the many scheme creditors voting in favour of the three schemes of arrangement will have to outweigh the interests of the six opposing scheme creditors.

**[280]** I therefore make the following orders:

(1) that the Scheme of Arrangement contained in the Explanatory Statements and the Updated List of Adjudicated Scheme Debts of the First applicant, being Top Builders Capital Bhd, as contained in Annexure A1 be approved and sanctioned by this court so as to be binding upon the First applicant, and the Scheme Creditors as defined therein;

(2) rhat the Scheme of Arrangement contained in the Explanatory Statements and the List of Adjudicated Scheme Debts of the second applicant Updated on 2 December 2021, being Ikhmas Jaya Sdn Bhd, as contained in Annexure A2 be approved and sanctioned by this court so as to be binding upon the second applicant, and the scheme creditors as defined therein;

(3) that the Scheme of Arrangement contained in the Explanatory Statements of the Third applicant, being Ikhmas Equipment Sdn Bhd, as contained in Annexure A3 be approved and sanctioned by this court so as to be binding upon the third applicant, and the Scheme creditors as defined therein;

(4) that an office copy of this order shall be lodged with the Companies Commission of Malaysia;

(5) pursuant to s 366(7) of the Companies Act 2016, that the applicants shall annex a copy of this order (excluding Annexure A1, A2 and A3) to the applicants' respective constitutions, if applicable, for a period of one year from the date this order is lodged with the Companies Commission of Malaysia;

(6) the applicants shall be at liberty to apply for such further orders or directions, including any abridgement or extension of any period prescribed by any order made in these proceedings;

(7) that Ernst & Young PLT, as the restructuring advisor for the applicants' schemes of arrangement, shall file a report within 60 days of this order to update this honourable court and the scheme creditors on:

(i) the number and details of all the Damai 88 contra units that was transferred/assigned from DJ Design & Suppliers Sdn Bhd ('DJ Design')/Solid Promenade Sdn Bhd ('Solid Promenade') to Ikhmas Jaya Sdn Bhd ('IJSB') and/or the Top Builders Capital Bhd Group of companies ('TBCB Group') and/or any other party(ies) whomsoever nominated by IJSB pursuant to the settlement agreement dated 17 April 2017 and the Supplementary Agreement dated 21 March 2018 both made between IJSB, DJ Design and Solid Promenade;

(ii) the value of any Damai 88 contra units transferred/assigned from DJ Design/ Solid Promenade to IJSB and/or the TBCB Group of companies and/or any other party(ies) whomsoever nominated by IJSB that may be held on trust for or for the benefit of IJSB as at 31 December 2020 (being the cut-off date for the IJSB scheme of arrangement) ('Damai 88 Contra Value'); and

(iii) whether the Damai 88 Contra Value has been accounted for in the IJSB scheme of arrangement, in particular Unit Nos 8–3, 12–9, 13–2, 13A-7, 13–10, 15–2, 15–7, 15–3A, 15–9, 17–3, 10–10 and 13-A10 as mentioned in the consent judgment dated 22 June 2020 made by Sykt Logam Unitrade Sdn Bhd with IJSB and TBCB pursuant to the Shah Alam High Court Civil Suit No BA-22NCvC-378–09 of 2019 ('consent judgment units') as well as Unit No 15–8, 13–9, 13A-8 and 11–2 held by Exofield Property Management Sdn Bhd ('Exofield') and unit No 11-3 pursuant to sale and purchase agreement dated 17 April 2017 between DJ Design, Exofield and Solid Promenade.

(8) where the value of any Damai 88 contra units transferred/assigned from DJ Design/Solid Promenade to IJSB and/or the TBCB Group of companies and/or any other party(ies) whomsoever nominated by IJSB, and held on trust for or for the benefit of IJSB, has not been accounted for in the IJSB scheme of arrangement as at 31 December 2020, any additional value will constitute an additional cash distribution from IJSB to all the IJSB scheme creditors, excluding the intercompany creditors, on the same terms and in addition to the cash payment set out in para 3.2.4(i) of the IJSB Explanatory Statement dated 4 August 2021 (encl 83 pp 43–80);

(9) that Ernst & Young PLT, as the restructuring advisor for the applicants' schemes of arrangement, shall perform an audit on all the intercompany debts pursuant to the schemes of arrangement of the applicants as at the

A cut-off date of 31 December 2020, and to file a report within 60 days of this order to update this honourable court; and

(10) parties are at liberty to apply for any consequential orders which may arise from the report and/or audit referred to in paras (8) and (9) of this order.

B

*Application allowed.*

Reported by Dzulqarnain Ab Fatar

C

D

E

F

G

H

I